United Nations A/HRC/38/20

General Assembly

Distr.: General
14 May 2018

Original: English

Human Rights Council
Thirty-eighth session
18 June–6 July 2018
Agenda items 2 and 3
Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms

Report of the United Nations High Commissioner for Human Rights

Summary

The present report sets out recommended action to improve accountability and access to remedy for victims of business-related human rights abuses through State-based non-judicial mechanisms. It has been compiled as part of the Accountability and Remedy Project of the Office of the United Nations High Commissioner for Human Rights (OHCHR), pursuant to the request of the Human Rights Council in its resolution 32/10. It follows up on the report on accountability and access to remedy through judicial mechanisms prepared during the first phase of the Project (see A/HRC/32/19 and Add.1).

In the report, the High Commissioner explains the scope of the work involved and the approach taken by OHCHR, and makes general observations about the role of State-based non-judicial mechanisms in achieving accountability and access to remedy in business and human rights cases. The report includes an annex containing a set of recommended "policy objectives" for States, supported by a series of elements intended to demonstrate the different ways that States can work towards meeting those objectives. Additional explanations, drawn from the two-year research process undertaken by OHCHR, are contained in an addendum to the report (A/HRC/38/20/Add.1).

GE.18-07714(E)

1807714

Please recycle

Contents

		Page
I.	Introduction	3
II.	Accountability and access to remedy: the role of State-based non-judicial mechanisms	3
III.	Overview	5
	A. Scope	5
	B. Methodology	5
	C. Structure and approach of the recommendations	6
	D. Target audience	6
IV.	General observations	6
	A. Policy coherence and systemic effectiveness	6
	B. Effectiveness of individual State-based non-judicial mechanisms	7
	C. State-based non-judicial mechanisms and cross-border cases	7
V.	Recommendations	7
Annex		
	Recommended action to improve the effectiveness of State-based non-judicial mechanisms relevant to business and human rights	9

I. Introduction

1. In 2013, as part of its mandate to advance the protection and promotion of human rights globally, the Office of the United Nations High Commissioner for Human Rights (OHCHR) initiated a process aimed at helping States strengthen their implementation of the pillar on access to remedy of the Guiding Principles on Business and Human Rights (see A/HRC/17/31, annex).

2. In its resolution 26/22, the Human Rights Council requested the High Commissioner to continue work on improving access to remedy and to report thereon to the Council. In November 2014, and pursuant to that mandate, OHCHR launched the Accountability and Remedy Project, which explored the role and use of judicial mechanisms (namely, domestic courts). The High Commissioner submitted a report thereon to the Council at its thirty-second session (A/HRC/32/19 and Add.1).

3. In its resolution 32/10, the Human Rights Council requested the High Commissioner to identify and analyse lessons learned, best practices, challenges and possibilities to improve the effectiveness of State-based non-judicial mechanisms that are relevant for the respect by business enterprises for human rights, including in a cross-border context. The work carried out by OHCHR pursuant to that request comprises part II of the Accountability and Remedy Project, which is the subject of the present report (see also A/HRC/38/20/Add.1).

II. Accountability and access to remedy: the role of State-based non-judicial mechanisms

4. Victims of business-related human rights abuses continue to struggle to achieve effective remedies for the harm they have suffered. While challenges vary from one context to another, a number of persistent problems common to many jurisdictions may be identified: fragmented, poorly designed or incomplete legal regimes; lack of legal development; lack of awareness of the scope and operation of regimes; structural complexities within business enterprises; problems in gaining access to sufficient funding for private law claims; and a lack of enforcement (A/HRC/32/19, para. 4).

5. Ensuring the accountability of business enterprises and access to effective remedy for victims is a vital part of a State's duty to protect against business-related human rights abuses, as required by international human rights law and reflected in the Guiding Principles. While effective judicial mechanisms are at the core of ensuring access to remedy (see A/HRC/17/31, annex, principle 26 and commentary), administrative, legislative and other non-judicial mechanisms play an essential role in complementing and supplementing judicial mechanisms (ibid., principle 27 and commentary).

6. State-based non-judicial mechanisms may take many different forms. In most jurisdictions, a range of mechanisms with a role to play in the handling of complaints and/or resolving disputes arising from business-related human rights abuses may be identified. Such mechanisms can be found at all levels of government: local, regional and national. While some have mandates relating to all human rights, many are specialized bodies that focus on specific human rights-related themes, such as labour rights, non-discrimination, consumer rights, the right to privacy, environmental rights, or the rights to water or to health. Common examples of relevant State-based non-judicial mechanisms include labour inspectorates; employment tribunals; consumer protection bodies (often tailored to different business sectors); environmental tribunals; privacy and data protection bodies; State ombudsman services; public health and safety bodies; professional standards bodies; and national human rights institutions.

7. In addition to the above-mentioned categories, States may innovate further to respond to specific business-related human rights risks within their jurisdictions, and in some cases have done so by establishing specialized mechanisms aimed at the protection of groups identified as being at a heightened risk of vulnerability or marginalization, such as

women, children, migrant workers, persons with disabilities, victims of modern slavery or bonded labour practices, or members of indigenous communities.

8. State-based non-judicial mechanisms also vary in their originating regimes and sources of authority. While many have their mandates, functions and powers defined by statute, some are the consequence of regulations or administrative orders, while others are on a more informal footing. Some — such as complaint mechanisms relating to professional standards — exist by virtue of specific regulatory regimes. Others, such as national contact points under the Guidelines on Multinational Enterprises of the Organization for Economic Cooperation and Development, are part of implementing arrangements under an international instrument and/or initiative.

9. These mechanisms are also diverse in their functions and powers; for instance, some are regulatory and/or adjudicative-type mechanisms, while others provide conciliation and/or mediation services. Some have self-executing powers (for example, to compel participation, to require production of information or to enforce remedial outcomes), whereas others rely on the cooperation of the parties involved. Some have the authority to conduct investigations on their own initiative, while the procedures followed by others can only be activated by specific complaints or disputes.

10. State-based non-judicial mechanisms can be broken down into five broad categories:

- Complaint mechanisms[1]
- Inspectorates[2]
- Ombudsman services[3]
- Mediation or conciliation bodies[4]
- Arbitration and specialized tribunals[5]

11. The diversity and widespread use of these mechanisms highlight both their importance in regulatory terms and their adaptability to different contexts and challenges. The experiences of those seeking accountability and remedy for business-related human rights abuses suggest, however, that in many cases these mechanisms are not yet fulfilling the role envisaged for them in the Guiding Principles (see A/HRC/17/31, principle 27 and commentary). Haphazard legal and institutional development in some jurisdictions has led to unevenness and gaps in the extent to which different human rights are protected through these mechanisms. Complaints about underresourcing and lack of technical capacity are common. Rights holders' lack of awareness of their rights, and the lack of accessibility of mechanisms (particularly by people at a heightened risk of vulnerability and/or marginalization) are problems in many jurisdictions. In serious or complex cases, it can be difficult to identify a mechanism (or combination of mechanisms) with a sufficiently broad

[1] Typically operated by a State-appointed, State-supported and/or State-approved body with public regulatory and enforcement responsibilities.

[2] Typically operated by a State-appointed, State-supported and/or State-approved body with public regulatory and enforcement responsibilities and a range of enforcement functions and powers, including powers of investigation and to prescribe penalties and/or remedial action. Such a mechanism may take action on its own initiative or in response to a complaint, or both. It may also have education and awareness-raising functions.

[3] Typically with a specialized mandate associated with specific interest groups, regulatory themes or commercial sectors. Such mechanisms are charged with receiving, investigating and resolving disputes between individuals and business enterprises, and frequently draw on mediation and/or conciliation techniques to do so.

[4] Similar to ombudsman services, and aimed at finding a mutually acceptable outcome rather than the apportionment of blame. Mediation and conciliation techniques are often used in the resolution of consumer, employment or environment disputes and may be the precursor to more formal processes (for example, arbitration and conciliation).

[5] Oversee dispute resolution processes that are adversarial and/or inquisitorial in nature. Such mechanisms often have a high degree of procedural formality. Some have investigative powers that can be used on their own initiative. They may have the power to make legally binding determinations.

mandate to address the case in its entirety; responses can therefore be fragmented, and remedial outcomes may not meet international standards (see annex, para. 4.1). Lastly, owing to the strictly territorial mandate of many State-based non-judicial mechanisms, they often have limited, if any, authority to respond to cross-border cases.

12. There is scope for significant improvement in the capacity of State-based non-judicial mechanisms, working individually and in combination, to deliver effective remedies in cases where human rights have been adversely affected by business activities. As a first step, there is a need for a greater understanding of the importance of State-based non-judicial mechanisms to the fulfilment by each State of its duty to protect against business-related human rights abuses and the contribution of each of these as part of a comprehensive State-based accountability and remedy system. Improving the effectiveness of these mechanisms and ensuring that they can fulfil the functions assigned to them within these systems (including the vital role of complementing and supporting judicial mechanisms) will require concerted and multifaceted efforts from all States, unilaterally and in cooperation.

III. Overview

A. Scope

13. Part II of the Accountability and Remedy Project has the aim of clarifying ways that States can strengthen their implementation of the pillar on access to remedy of the Guiding Principles through State-based non-judicial mechanisms, focusing in particular on (a) the structure and mandate of different mechanisms; (b) investigations and information-gathering processes; (c) aspects of the "effectiveness criteria" for non-judicial mechanisms (see A/HRC/17/31, principle 27 and commentary); (d) systemic effectiveness and policy coherence; and (e) cross-border cooperation.[6]

14. Many States face wider political, social and economic challenges that may undermine the effectiveness of State-based non-judicial mechanisms, including with regard to respect for the rule of law, poverty, corruption, and lack of resources and capacity of key institutions. The recommended action (see annex) is intended to complement and support the vital action by States to address these wider challenges.

B. Methodology

15. To better understand the challenges relating to State-based non-judicial mechanisms at the national level, and the actions likely to be most effective given the diversity of legal systems, structures and traditions around the world, OHCHR gathered empirical information from a wide range of jurisdictions, by reviewing more than 430 business and human rights-related events, news reports, allegations and disputes; conducting a detailed information-gathering process (comprising a global online consultation and a directed process involving scholars and practitioners from a wide range of jurisdictions); performing additional work focusing specifically on the role and activities of national contact points under the OECD Guidelines and national human rights institutions; participating in a webinar to gather business views; holding two multi-stakeholder consultations; and conducting regular online consultative processes at key points in the project.[7] All key

[6] The project parameters proposed by OHCHR were reviewed at a two-day expert workshop held in Geneva on 19 and 20 January 2017. The workshop was attended by representatives of States, civil society, businesses, United Nations agencies and international organizations, and academics with expertise in the field of State-based non-judicial mechanisms (see https://business-humanrights.org/sites/default/files/images/ARPII_FINAL%20Scoping%20Paper.pdf). For the final list of focus areas and research processes, see https://business-humanrights.org/sites/default/files/documents/ARPII_phase1_Sector%20Study_Part%201.pdf.

[7] See OHCHR, "Accountability and Remedy Project Part II: State-based non-judicial mechanisms: State-based non-judicial mechanisms for accountability and remedy for business-related human

documents and milestones of the project were communicated directly to States and made available to other stakeholders through relevant platforms and information-sharing channels.[8] In addition, a meeting to gather feedback directly from representatives of States and State-based non-judicial mechanisms was held in Geneva on 22 and 23 February 2018.

C. Structure and approach of the recommendations

16. The recommended action comprises a number of policy objectives and elements to demonstrate the different ways that policy objectives can be achieved (see annex). This structure, based on an approach similar to that used for the final report on part I of the Accountability and Remedy Project (A/HRC/32/19 and Add.1), is deliberately flexible. To ensure global relevance and applicability, the recommended action is designed to be readily adaptable to different legal systems and contexts while also practical, forward-looking and reflective of international standards on access to remedy.

17. The recommended action should not be regarded as a finite list of possible solutions. There may indeed be other ways of achieving the underlying goal of improving implementation by States of the Guiding Principles in general and the effectiveness criteria for non-judicial grievance mechanisms (see A/HRC/17/31, principle 31 and commentary) in particular. Nor should it be read as an exhaustive list of the actions to be taken by States to implement the pillar on access to remedy of the Guiding Principles.

18. Nevertheless, the recommended action will be a significant resource for States seeking to improve the effectiveness of their non-judicial mechanisms with respect to business and human rights challenges, as well as constituting a possible platform for future dialogue, cross-fertilization of ideas, innovation and progress.

D. Target audience

19. The recommended action is addressed primarily to States and State agencies concerned with the design, development, administration and oversight of relevant State-based non-judicial mechanisms. States can implement these policy objectives in a variety of ways, for example, through a domestic review process, as part of national action plans on business and human rights, in strategies to improve access to justice or through other processes more suitable to the national context. The recommended action will also be relevant to policymakers and practitioners, including those involved in the management of State-based non-judicial mechanisms, law enforcement and national human rights institutions. The policy objectives may also help to inform the ongoing work of international bodies with mandates relevant to business and human rights, including human rights treaty bodies and the open-ended intergovernmental working group on transnational corporations and other business enterprises with regard to human rights. Various elements of the recommended action may be used to guide business enterprises and may be drawn upon by other stakeholders, such as civil society organizations and trade unions. Additional explanations of the different elements of recommended action (and suggested ways that they can be implemented) are contained in the addendum to the present report.

IV. General observations

20. The recommended action focuses on the steps that States can take to improve the effectiveness of State-based non-judicial mechanisms, at both the systemic and individual levels, in providing accountability and access to remedy in cases of business-related human rights abuses.

---

rights: Supporting actors or lead players?", discussion paper prepared for the 6th UN Annual Forum on Business and Human Rights, Geneva, 27–29 November 2017, 2 November 2017.

[8] See www.ohchr.org/EN/Issues/Business/Pages/ARP_II.aspx.

A. Policy coherence and systemic effectiveness

21. In many (if not all) jurisdictions, the goals of improved accountability and access to remedy for business-related human rights abuses are often best served by providing affected individuals and communities with a range of options for seeking redress, which could involve judicial mechanisms, non-judicial mechanisms or, in some cases, a combination of them.

22. Part I of the recommended action addresses the challenges faced in achieving policy coherence between these diverse mechanisms, and the various ways in which States can work towards developing a legal and regulatory environment that enables these various mechanisms to make a positive collective contribution to accountability and remedy in business and human rights cases. It has been designed to help States (a) to identify the important interlinkages between the different bodies that make up a comprehensive State-based system to remedy business-related human rights abuse; and (b) to improve them where possible so that domestic laws and policies, taken as a whole, are able to provide affected individuals and communities with realistic and readily identifiable pathways to remedial outcomes that meet international standards with respect to the components of effective remedy, and make a positive contribution to future prevention.

B. Effectiveness of individual State-based non-judicial mechanisms

23. Part II of the recommended action concerns the effectiveness of individual State-based non-judicial mechanisms relevant to business respect for human rights. While different human rights-related risks and operating contexts will often require different regulatory and law enforcement responses, the elements of effectiveness of non-judicial mechanisms, and the steps needed to implement them effectively, are common to many different types of mechanisms. The recommended action in part II draws from the various information-gathering activities undertaken by OHCHR as part of the project, and highlights the different ways in which the various effectiveness criteria set out in Guiding Principle 31 can be implemented in practice.

C. State-based non-judicial mechanisms and cross-border cases

24. At present, relatively few State-based non-judicial mechanisms have the legal authority and capacity to respond to cross-border cases (see para. 15 above). In some jurisdictions, such mechanisms have been established to provide a means by which concerns about business-related human rights abuses in other jurisdictions can be raised and mediated, the national contact point system under the OECD Guidelines being a notable example. These mechanisms are, for the most part, mediation-type mechanisms with limited formal investigative powers of their own, and rely for their effectiveness on the cooperation of the business enterprises concerned. State-based non-judicial mechanisms that have strong enforcement powers and the ability to investigate allegations on their own initiative (namely, those mechanisms with specific regulatory mandates) tend to be limited to addressing within-territory harm.

25. Recent State practice, however, suggests a growing willingness by some State-based non-judicial mechanisms, and national human rights institutions in particular, to enter into ad hoc cooperative arrangements with counterparts in other States to investigate and identify ways of addressing the adverse effects of business-related activities on human rights that cross national boundaries.

26. Part III of the recommended action highlights the various ways in which the capacity of State-based non-judicial mechanisms respond to cross-border cases could be enhanced in practice.

V. Recommendations

27. **OHCHR recommends that Member States:**

(a) **As part of their implementation of the pillar on access to remedy of the Guiding Principles, consider undertaking a review of the scope and effectiveness of relevant State-based non-judicial mechanisms using the policy objectives and elements set out in the recommended action together with the model terms of reference (see A/HRC/38/20/Add.1) as a starting point;**

(b) **Develop a comprehensive strategy for the implementation of the policy objectives in a manner that responds appropriately to local legal structures, challenges and needs, for instance, as part of national action plans on business and human rights[9] and/or as part of strategies to improve access to justice in general;**

(c) **Take steps, using the policy objectives and elements set out in the recommended action as a starting point, to enhance the ability of State-based non-judicial mechanisms to respond to cases of business-related human rights abuses where the relevant facts, evidence, harm and/or actors are located in more than one jurisdiction, to the extent appropriate in the light of the mandates and functions of the mechanisms.**

[9] See Guidance on National Action Plans on Business and Human Rights, Working Group on Business and Human Rights, December 2014.

Annex

Recommended action to improve the effectiveness of State-based non-judicial mechanisms relevant to business and human rights

Part I. Improving the effectiveness of State-based non-judicial mechanisms within the context of the State's broader system of laws, policies and regulatory institutions

Policy objective 1: State-based non-judicial mechanisms, individually and in combination, contribute to the effective implementation of the State's international legal obligations and policy commitments with regard to accountability and remedy for business-related human rights abuses in a manner that is consistent with domestic legal structures and constitutional principles, and responsive to local needs and operating conditions, in particular the type, nature and severity of business-related human rights risks.

1.1 The State has conducted a comprehensive review process and consulted appropriately with stakeholders to determine (a) the range and types of State-based non-judicial mechanisms established in its jurisdiction that are relevant to respect by business enterprises of human rights; (b) whether their degree of independence, mandates, functions and powers are appropriate and sufficient, when analysed together with relevant laws and policies, to provide a legal and regulatory environment conducive to business respect for human rights; and (c) whether they meet the needs and sufficiently safeguard the rights of the individuals and/or communities for whom those mechanisms are intended.

1.2 The State has taken the steps necessary to correct any deficiencies identified with respect to the issues mentioned in paragraph 1.1 above.

1.3 Where relevant and appropriate, State-based non-judicial mechanisms are encouraged (and provided with the resources necessary) to engage and cooperate with other relevant State-based non-judicial mechanisms, law enforcement bodies and regulatory agencies for the purposes of improving the effectiveness of communication and coordination between the various mechanisms, bodies and agencies.

1.4 The State regularly reviews the effectiveness of the overall contribution of State-based non-judicial mechanisms to accountability and remedy for business-related human rights abuses, taking particularly into account matters such as (a) the extent to which there is policy coherence (see A/HRC/17/31, principle 8 and commentary) between the respective roles, policies and practices of relevant State-based non-judicial mechanisms and those of other relevant governmental departments, regulatory agencies and other State-based institutions; (b) areas where communication and coordination between different mechanisms, bodies and agencies could be improved in the light of their mandates and functions; (c) the degree of awareness and understanding of key personnel of State-based non-judicial mechanisms of the State's international legal obligations with regard to human rights and the role of such mechanisms in meeting those obligations; (d) whether these mechanisms meet the needs and sufficiently safeguard the rights of individuals and/or communities for whom they are intended; and (e) the recommendations of relevant oversight bodies, including peer review mechanisms. The State makes public the findings arising from such review processes and implements the necessary legal, policy and structural reforms and administrative improvements.

Policy objective 2: Individuals and communities affected by or at risk of business-related human rights abuses have a realistic and readily identifiable pathway to an effective remedy.

2.1 Information regarding the various complaint handling and/or dispute resolution options and mechanisms that may be available in different types of contexts and cases are made available to rights holders in a manner that is readily understandable by them.

2.2 Advisory and support services are made available to rights holders, which includes advice with regard to (a) the relative advantages and disadvantages of different complaint handling and/or dispute resolution options; and (b) the types of remedial outcomes that may be achieved through different mechanisms (including judicial ones).

2.3 The State encourages and provides the resources necessary to enable providers of the information and/or advisory and support services mentioned in 2.1 and 2.2 above to engage in appropriate physical outreach activities among relevant rights holders to promote the widest possible awareness of the various complaint handling and/or dispute resolution options and mechanisms that may be available in different contexts and cases, including through regional offices and service centres, mobile offices and "road shows".

2.4 Where the realization of an effective remedy is likely to require or benefit from the involvement of more than one State-based non-judicial mechanism, law enforcement body and/or regulatory agency, arrangements have been made to facilitate (as appropriate in the light of the mandates, functions and powers of the relevant agencies or mechanisms) the referral or exchange of information, proceedings and/or enquiries between the relevant agencies, bodies or mechanisms in a manner that is equitable, predictable, rights-compatible and transparent; consistent with domestic legal structures and constitutional principles; consistent with the objective of reducing barriers to remedy and not erecting barriers to prevent legitimate cases from being brought before rights holders' preferred mechanisms; takes into due account rights holders' needs and preferences with regard to access to different kinds of mechanisms; and also takes into due account the need for confidentiality in certain circumstances, and particularly with regard to the identity of individuals who may be at risk of threats, harassment or reprisals.

Policy objective 3: State-based non-judicial mechanisms and judicial mechanisms complement and support each other in a manner that promotes accountability and access to remedy for business-related human rights abuses.

3.1 There is delineation between the roles and responsibilities of State-based non-judicial mechanisms and judicial mechanisms. This delineation is appropriate to the type, nature and severity of different business-related human rights abuses, and recognizes that there will be cases where judicial recourse is an essential part of gaining access to remedy.

3.2 To the extent relevant and appropriate in the light of their mandates and functions, State-based non-judicial mechanisms can readily seek assistance from judicial mechanisms in relation to specific matters, such as the use of powers of investigation, in obtaining injunctive relief or in the enforcement of legally binding remedial outcomes.

3.3 Where relevant and appropriate in the light of their mandates and functions, State-based non-judicial mechanisms may (a) seek or recommend the transfer of complaints and/or disputes for adjudication by judicial mechanisms and/or (b) refer allegations or evidence of business involvement in human rights abuses to judicial mechanisms and/or other law enforcement bodies for investigation and/or further action. The procedures governing such transfers or referrals are equitable, predictable, rights-compatible and transparent, and take into due account rights holders' needs and preferences with respect to different complaint handling and/or dispute resolution options, and the need for confidentiality in certain circumstances, particularly with regard to the identity of individuals who may be at risk of threats, harassment and reprisals.

3.4 Rights holders are made aware of (a) the circumstances in which, and the procedural stages at which, judicial mechanisms may become involved in the investigation, adjudication and/or resolution of complaints and/or disputes that have been initiated in or referred to State-based non-judicial mechanisms; and (b) their rights to challenge and/or to

request a review of decisions by a State-based non-judicial mechanism with respect to the transfer or referral of proceedings, allegations or evidence to judicial mechanisms and/or other law enforcement bodies.

3.5 The procedural rules and practices of judicial mechanisms provide for the participation of State-based non-judicial mechanisms in judicial proceedings to the extent relevant and appropriate (for example, as prosecutors, advocates, representatives, expert witnesses or as persons authorized to intervene on the basis of having a specific interest or relevant expertise).

3.6 State-based non-judicial mechanisms and judicial mechanisms have adopted and implemented equitable, predictable, rights-compatible and transparent procedures to be followed in the event that more than one mechanism (whether judicial or non-judicial) has been called upon to investigate, adjudicate upon and/or mediate a set of allegations arising from a single event and/or similar sets of circumstances and involving the same business enterprises.

3.7 Rights holders retain the ability to alter a remedial course of action in response to evolving circumstances, including by transferring a complaint and/or dispute from a State-based mechanism to a judicial mechanism in the event that it becomes clear that judicial recourse is an essential part of having access to remedy and/or alternative methods of achieving effective remedy are unavailable.

3.8 In cases where both State-based non-judicial mechanisms and judicial mechanisms may have a role in the delivery of an effective remedy, their procedural rules and practices operate in a manner that serves to reduce barriers to remedy for rights holders and does not contribute to the creation of new barriers to remedy.

Policy objective 4: State-based non-judicial mechanisms, individually and in combination, contribute to the realization of effective remedial outcomes for individuals and communities that have been subjected to business-related human rights abuses.

4.1 The State adopts and implements laws and policies with respect to State-based mechanisms that are aligned with the principles of equal and effective access to justice, adequate, effective and prompt reparation for harm suffered, and access to relevant information concerning violations and reparation mechanisms.[1] To this end, laws and policies relevant to the realization of remedial outcomes in cases of business-related human rights abuses draw appropriately from all recognized categories of full and effective reparation (namely, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition),[2] and wherever possible, provide for choice by rights holders of the type of remedial outcomes most appropriate in the light of the specific circumstances of the case.

4.2 The State has made appropriate arrangements to address the risk of non-implementation of remedial outcomes (including non-compliance with the terms of a remedial agreement or determination), which may include (depending upon the mandates and functions of the relevant mechanisms) (a) the use of robust self-executing enforcement powers; (b) the possibility of enforcement through judicial mechanisms; (c) regulatory or administrative follow-up activities (including monitoring); or (d) the imposition of regulatory and/or other consequences. Agencies responsible for enforcement, follow-up, monitoring or other action are appropriately responsive to requests by rights holders to exercise their powers of enforcement and/or supervision (as relevant), and operate in a manner consistent with international standards relating to the prompt implementation of remedial outcomes in cases of human rights abuse.

[1] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147, annex).

[2] Ibid., sect. IX, para. 18.

Part II. Improving the effectiveness of individual State-based non-judicial mechanisms relevant to the respect by business enterprises for human rights

Policy objective 5: State-based non-judicial mechanisms are effective mechanisms for dealing with business-related human rights harm.

5.1 The State adopts and implements laws and/or policies with regard to the establishment and administration of State-based non-judicial mechanisms that are aligned with the effectiveness criteria set out in Guiding Principle 31.

5.2 State-based non-judicial mechanisms operate in a manner that is consistent with the recommendations of relevant oversight bodies, and take into due account the recommendations of other entities concerned with monitoring and evaluating their performance, such as peer review mechanisms.

Policy objective 6: State-based non-judicial mechanisms are legitimate.[3]

6.1 The State has made the structural, institutional, administrative and resourcing arrangements needed to (a) provide each State-based mechanism with a degree of operational autonomy from government functions that is appropriate in the light of its specific mandate and functions; (b) minimize the risk of conflicts of interest for the State-based mechanism (or any of its personnel) with respect to the discharge of its powers and/or functions; and (c) minimize the risk of any undue influence of any one actor or group of actors.

6.2 Where they are vested with powers to investigate allegations and/or complaints on their own initiative, State-based non-judicial mechanisms exercise such powers in an equitable, rights-compatible, predictable, transparent, timely and professional manner.

6.3 State-based non-judicial mechanisms have adopted and implemented appropriate procedures in the light of their mandates and functions to enable rights holders and other stakeholders to raise concerns or complaints about the manner in which such mechanisms have discharged specific functions or powers, such as the way they have responded to, investigated, adjudicated or resolved complaints and/or disputes.

6.4 The State has made appropriate arrangements to provide for the possibility to review a State-based non-judicial mechanism's decisions, actions or non-action in certain circumstances, such as where there is evidence of a possible conflict of interest, a procedural irregularity or other impropriety.

6.5 State-based non-judicial mechanisms are subject to periodic review by a suitable oversight body or peer review mechanism, which can offer advice as to how their performance and effectiveness might be improved.

6.6 State-based non-judicial mechanisms have adopted and implemented appropriate policies and procedures to detect, avoid and respond appropriately to conflicts of interest (both actual and potential), including those that may arise where the relevant mechanism has had conferred upon it a range of functions, such as education and awareness-raising, in addition to addressing complaints and resolving disputes.

Policy objective 7: State-based non-judicial mechanisms are accessible.[4]

7.1 State-based non-judicial mechanisms work proactively to raise awareness among rights holders of their mandates, functions and activities, including through targeted outreach activities.

7.2 The State takes such steps as are reasonable and appropriate in the light of the mandates and functions of the State-based non-judicial mechanism concerned to enable and

[3] A/HRC/17/31, principle 31 (a) and commentary.

[4] Ibid., principle 31 (b) and commentary.

to encourage to make complaint handling and/or dispute resolution services of the mechanism available to parties free of charge.

7.3 Where possible, financial assistance is made available to rights holders to help to defray the costs associated with assessing the relevant services. Proactive steps are taken to ensure that information about such financial assistance is conveyed to the rights holders for whom it is intended.

7.4 Complaint handling and/or dispute resolution processes are designed to be as user-friendly as possible and, where appropriate, allow for the possibility of (a) representation in person (namely, without the need for legal counsel); and/or (b) the assistance of a representative or other third party; and (c) collective redress.

7.5 State-based mechanisms take appropriate steps to enable rights holders to access and participate in complaint handling and/or dispute resolution processes in ways most convenient to them, including through online forms, telephone reporting, by post or in person.

7.6 State-based non-judicial mechanisms make available, free of charge, (a) advisory and support services necessary to promote easy access by individuals and communities to complaint handling and/or dispute resolution processes, including through online resources, such as downloadable pamphlets and videos, paper resources, and telephone helplines; and, (b) where relevant and appropriate, suitable advisory or "triage" services to ensure that complaints and/or disputes can be swiftly directed to the place where they can most quickly, efficiently and appropriately be resolved in the light of all relevant circumstances.

7.7 The materials, resources and advisory services referred to in paragraphs 7.5 and 7.6 above are made available (a) in formats that meet the needs and are consistent with the rights of persons with disabilities, including persons with impairments to hearing, sight or mobility; and (b) to an appropriate extent, in the light of the relevant mechanism's mandate and functions, in the languages of the rights holders for whom they are intended.

7.8 Periods of limitations, to the extent that they apply to the complaint handling and/or dispute resolution functions of State-based non-judicial mechanisms, are set in accordance with certain factors, such as the nature and severity of human rights risks addressed by the mechanism, and other issues, such as the remoteness of individuals and communities likely to be at risk and the particular needs of the rights holders for whom the mechanism is designed to help.

7.9 State-based non-judicial mechanisms have put in place measures designed to allow access to and use of the mechanisms by rights holders on an equal basis with others, for instance by improving physical and communicational accessibility to premises and by making adjustments to processes and procedures to facilitate their use (and reduce barriers to participation) by persons with disabilities, including deaf persons and persons with intellectual or psychosocial impairments, and older persons.

7.10 State-based non-judicial mechanisms adopt and implement procedures and practices to protect confidentiality where the context and circumstances of the case would make it necessary, particularly with respect to the identity of individuals who may be at risk of threats, harassment or reprisals, and appropriate safeguarding arrangements for the protection of rights holders, taking into account the particular needs of persons at greater risk of vulnerability and/or marginalization.

7.11 The confidentiality of the private information of users of State-based non-judicial mechanisms is protected by robust domestic law regimes on privacy and the protection of personal data.

7.12 The State adopts and enforces laws and takes other measures to protect individuals and communities from the risk of reprisals, harassment and discrimination as a consequence of having referred any business and human rights-related allegation, claim, complaint or dispute to a State-based non-judicial mechanism.

Policy objective 8: State based non-judicial mechanisms are predictable.[5]

8.1 In addition to the steps described in paragraph 7.1 above, State-based non-judicial mechanisms work proactively to raise awareness among rights holders about the stages of relevant complaint handling and/or dispute resolution processes, including information about (a) any preliminary requirements that must be met; (b) what parties can expect at each stage, the time frames within which key decisions will be taken and milestones reached; (c) the rights of parties to withdraw from complaint handling and/or dispute resolution processes once commenced; (d) the legal consequences of remedial outcomes; (e) procedures for monitoring remedial outcomes of complaint handling and/or dispute resolution processes; and (f) the contents of any regulatory standards, codes of conduct or policies relating to any of the above.

8.2 To the extent relevant and appropriate in the light of their mandates and functions, permitted by applicable laws, standards and policies with respect to confidentiality and protection of whistle-blowers and individuals who may be at risk of threats, harassment or reprisals, and appropriate for the purposes of enhancing public understanding of complaint handling and/or dispute resolution processes and methodologies used in practice, State-based non-judicial mechanisms publish readily understandable information relating to past cases and/or determinations, such as case histories and/or aggregated information relating to the types of claims, complaints or disputes referred, the types of remedial outcomes and the time taken to achieve them.

Policy objective 9: State-based non-judicial mechanisms are equitable.[6]

9.1 In addition to the steps described in paragraphs 7.1 and 8.1 above, State-based non-judicial mechanisms work proactively to raise awareness among rights holders about sources of further information, advice and assistance available to enable them to participate fairly and effectively in the relevant processes.

9.2 State-based non-judicial mechanisms have adopted and implemented the procedures and practices necessary, in the light of their mandates and functions, to ensure that parties to a complaint and/or dispute receive (a) adequate and timely information concerning the arguments, allegations and evidence provided by the other party; (b) copies of or access to documentary or other evidence; (c) adequate opportunity to comment on each and all of the items mentioned in points (a) and (b) prior to any final decision or determination; (d) sufficiently detailed written reasons for decisions; and (e) readily understandable information concerning the steps to be taken, and the time limits that apply, should a party wish to seek review of or challenge a final decision or determination.

9.3 The procedural rules, policies and practices of State-based non-judicial mechanisms respect the rights of rights holders to withdraw from complaint handling and/or dispute resolution processes if they are dissatisfied with those processes and do not unfairly preclude access by rights holders to judicial recourse.

9.4 State-based non-judicial mechanisms have adopted and implemented policies, procedures and practices to ensure that its personnel disclose promptly any possible conflict of interest with respect to any complaint or dispute that they are asked to handle or resolve, and that following such a disclosure, the person concerned has no further involvement with the matter and is suitably replaced.

Policy objective 10: State-based non-judicial mechanisms are transparent.[7]

10.1 In addition to the steps described in paragraphs 7.1, 8.1 and 9.1 above, State-based non-judicial mechanisms work proactively to raise awareness among rights holders with respect to (a) procedural rules, policies, codes of conduct or standards that will govern complaint handling and/or dispute resolution processes, including liaison with parties and/or any investigation or fact-finding activities; (b) the adherence of the mechanism to

[5] Ibid., principle 31 (c) and commentary.
[6] Ibid., principle 31 (d) and commentary.
[7] Ibid., principle 31 (e) and commentary.

performance standards and the status of relevant certifications; and (c) other information likely to be important to rights holders, such as information about the average duration of complaint handling and/or dispute resolution processes and the likely costs in different scenarios.

10.2 State-based non-judicial mechanisms have put in place procedures to ensure that parties to a complaint and/or dispute are kept informed of key developments and requirements, including through online accounts, telephone helplines or dedicated case workers, as appropriate.

10.3 State-based non-judicial mechanisms publish and take proactive steps to disseminate periodic reports on their activities and performance that set out in a readily understandable format information likely to be useful to relevant rights holders, such as (a) the types of complaints and/or disputes referred to the mechanism in a given period; (b) the percentage of cases successfully resolved, and in what time period; (c) the percentage of cases rejected by the mechanism, and on what grounds; and (d) common challenges.

10.4 Information with respect to the activities and performance of State-based non-judicial mechanisms that are overseen by or operate within government departments is accessible to members of the public pursuant to domestic regimes on freedom of access to governmental information.

Policy objective 11: State-based non-judicial mechanisms are rights-compatible.[8]

11.1 The State adopts and implements laws and/or policies with regard to the administration of State-based non-judicial mechanisms that are consistent with the State's obligations under international human rights law, including the rights to equality of treatment and to non-discrimination.

11.2 State-based non-judicial mechanisms exercise their mandates and functions in a manner that promotes (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation mechanisms.[9]

11.3 State-based non-judicial mechanisms have, with a view to achieving prompt, adequate and effective remedial outcomes for business-related human rights abuses, adopted and implemented procedures and practices designed to ensure, within the framework of and subject to their mandates and functions, that (a) complaints and/or disputes are addressed and concluded without undue delay; (b) in cases of severe or irremediable harm, the mechanism can take pre-emptive action to mitigate the harm; (c) rights holders are properly consulted with regard to the elements of an adequate and effective remedy in their specific case; (d) rights holders are properly consulted about and given an opportunity to comment on (and, where appropriate, provided with opportunities to take further or corrective action prior to) any decision by the mechanism to reject, defer, abandon or settle a complaint or dispute; and (e) following conclusion of a complaint handling and/or dispute resolution process, rights holders are provided with information regarding their options for further action, including on the steps that they should take in the event of non-compliance by a party with the terms of a remedial outcome of a non-judicial process.

11.4 In deciding whether to reject, defer, abandon or settle a complaint handling or dispute resolution process, State-based non-judicial mechanisms give due regard to the availability (or non-availability) of remedies under alternative mechanisms (including judicial mechanisms).

11.5 State-based non-judicial mechanisms take steps to ensure that members of their staff with responsibility for receiving and/or handling complaints and/or adjudicating and

[8] Ibid., principle 31 (f) and commentary.

[9] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, art. IX, para. 18.

resolving complaints and/or disputes arising from adverse human rights impacts that are business-related and/or providing advice or support to rights holders with respect to the same (a) are familiar with the needs and rights of the rights holders (whether individuals or groups) for whom the relevant mechanism is intended, with due consideration for the particular needs of individuals or groups at a greater risk of vulnerability and/or marginalization, and (b) have access to the human rights expertise needed to discharge their responsibilities in a non-discriminatory way and in a manner consistent with the international legal obligations and policy commitments of the State with respect to business and human rights.

Policy objective 12: State-based non-judicial mechanisms are a source of continuous learning.[10]

12.1 The State makes appropriate use of the expertise of State-based non-judicial mechanisms with regard to the development of regulatory and enforcement policy relevant to the respect by business enterprises for human rights. To this end, the mechanisms are given appropriate opportunities to make recommendations for reforms to institutions, initiatives and operating practices aimed at improving the effectiveness of State-based non-judicial mechanisms, and enhancing their contribution to accountability and remedy in cases of business-related human rights abuses.

12.2 Periodic and/or annual reports by State-based non-judicial mechanisms include, to the extent possible and relevant, information about (a) regulatory or compliance challenges in specific operating or industrial contexts, or on systemic or market-related issues that may be impeding the effectiveness of regulatory strategies or agencies, and (b) legal or policy interventions that may help to address these challenges, together with information about their effectiveness, if available. The State draws from this know-how and the recommendations in developing policies, legislation, regulation and guidance aimed at addressing business-related human rights risks and protecting against business-related human rights abuses.

12.3 The State has made arrangements to allow for the sharing of know-how among State-based non-judicial mechanisms, and between the mechanisms and other regulatory agencies, to the extent appropriate in the light of their mandates and functions, with a view to improving the capacity and effectiveness of all domestic bodies and initiatives that, directly or indirectly, monitor respect by business enterprises for human rights.

Part III. Improving the effectiveness of State-based non-judicial mechanisms in cross-border cases

Policy objective 13: State-based non-judicial mechanisms have access to information, advice and assistance from relevant State agencies in other jurisdictions to the extent and in the manner required for the fulfilment of their mandates and functions.

13.1 The State sets out a clear policy expectation that State-based mechanisms will respond to cross-border cases to the fullest extent permitted in the light of their mandates and functions, and considers making appropriate adjustments to such mandates and functions where this is necessary to respond to business-related human rights risks that are cross-border in nature.

13.2 The State has made arrangements to enable State-based non-judicial mechanisms, to the extent appropriate and relevant in the light of their mandates and functions, to seek assistance from, and to respond to requests for assistance from, State agencies in other jurisdictions for the purposes of (a) gathering information relating to complaints and/or disputes, (b) informing complaint handling and/or dispute resolution processes, (c) adjudicating and resolving complaints and/or disputes, and/or (d) delivering an effective remedial outcome.

[10] A/HRC/17/31, principle 31 (e) and commentary.

13.3 State-based non-judicial mechanisms, to the extent appropriate and relevant in the light of their mandates and functions, participate in and contribute to the development of initiatives and networks of State agencies and practitioners from different jurisdictions with the aim of (a) improving the ease with which and speed at which requests for information, advice and assistance can be made and addressed; (b) creating opportunities for joint and/or coordinated responses to complaints and/or disputes arising from business involvement in human rights abuses that have, or appear to have, a cross-border element; and (c) promoting peer learning among State agencies about regulatory, complaint handling and dispute resolution best practices.

13.4 The State has made arrangements for State-based non-judicial mechanisms, to the extent appropriate and relevant in the light of their mandates and functions, to be able to call upon their embassies and consular services for assistance with research and information-gathering for the purposes of investigating, adjudicating and resolving claims, complaints or disputes arising from adverse human rights impacts that are business related.

13.5 States work through their embassies and consular services to raise awareness and publicize information about the activities and procedures of relevant State-based non-judicial mechanisms, including information about their mandates and functions in investigating, adjudicating and resolving complaints and/or disputes arising from business involvement in human rights abuses which have, or which appear to have, a cross-border element.

13.6 State-based non-judicial mechanisms have access to the information, support, training and resources necessary to enable personnel to make effective use of the arrangements referred to in paragraphs 13.2, 13.3, 13.4 and 13.5 above.

13.7 The State works through relevant bilateral, regional and multilateral forums and bodies to strengthen methods, systems and domestic law regimes and initiatives relevant to investigating, adjudicating and resolving complaints or disputes arising from business involvement in human rights abuses.

Improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms: explanatory notes to final report

Contents

		Page
I.	Introduction	3
	A. Background, methodology and relationship to OHCHR's wider programme of work on accountability and remedy for business-related human rights abuses	3
	B. Recognizing the diversity of State-based non-judicial mechanisms and their legal and regulatory settings	4
II.	Explanatory notes to the recommended action (A/HRC/38/20, annex)	6
	A. Improving the effectiveness of State-based non-judicial mechanisms within the context of the State's broader system of laws, policies and regulatory institutions	6
	B. Improving the effectiveness of individual State-based non-judicial mechanisms relevant to the respect by business enterprises for human rights	11
	C. Improving the effectiveness of State-based non-judicial mechanisms in cross-border cases	16

I. Introduction

1. The present document serves as a companion to the report of the United Nations High Commissioner for Human Rights to the Human Rights Council on improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms (A/HRC/38/20) (the "High Commission's main report"). It explains how OHCHR's research has been taken into account in the development of the policy objectives and supporting elements set out in the annex of the High Commissioner's main report with the aim of assisting policy-makers tasked with translating these policy objectives and supporting elements into specific domestic contexts.[1]

A. Background, methodology and relationship to OHCHR's wider programme of work on accountability and remedy for business-related human rights abuses

2. The High Commissioner's main report, together with this explanatory addendum, marks the conclusion of the second phase of the OHCHR Accountability and Remedy Project. The project was launched in 2013 with the aim of helping States strengthen their implementation of the pillar on access to remedy in the UN Guiding Principles on Business and Human Rights.[2] Its first phase, concluded in June 2016,[3] explored the role and use of *judicial mechanisms* (i.e. domestic courts) including in cross-border cases.[4]

3. The Human Rights Council, in its resolution 32/10, welcomed OHCHR's work, and made a follow up request for OHCHR to continue its work on accountability and remedy with regards to State-based non-judicial mechanisms that are relevant for the respect by business enterprises for human rights, including in a cross-border context.[5] The second phase of the Accountability and Remedy Project has focussed on substantive and practical issues to improve the effectiveness of *State-based non-judicial mechanisms* in achieving corporate accountability and access to remedy in cases of business related human rights abuse.

4. This second phase of work, on State-based non-judicial mechanisms was conducted over a nearly two-year period (July 2016 - April 2018). It involved desk-based research and several empirical information-gathering processes to better understand (a) the extent to which State-based non-judicial mechanisms are used in practice, (b) the extent to which (and the different ways in which) these mechanisms respond to various aspects of the "effectiveness criteria" for non-judicial mechanisms in the UN Guiding Principles on Business and Human Rights[6] and (c) the experiences of rights-holders and other stakeholders.[7]

5. Following the approach of the first phase of the project (i.e. on *judicial mechanisms*),[8] the High Commissioner's main report (i.e. on *State-based non-judicial mechanisms*) includes an opening narrative section, followed by a technical annex with recommended action arranged in a series of *policy objectives* supplemented by supporting *elements* designed to show how the policy objectives can be achieved in practice.

---

[1] On the target audience for the High Commissioner's main report and this addendum see further A/HRC/38/20, paragraph 19.

[2] See A/HRC/17/31, annex

[3] A/HRC/32/19 and Add. 1

[4] This first phase was requested by the Human Rights Council in its resolution 26/22, paragraph 7.

[5] See A/HRC/Res/32/10, paragraph 13

[6] A/HRC/17/31, annex, principle 31.

[7] A brief description of OHCHR's methodology, can be found in the High Commissioner's main report, see A/HRC/38/20, paragraph 15. For further information see the discussion paper prepared by OHCHR for the 6th Annual UN Annual Forum on Business and Human Right, 27-29 November 2017, http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/ARPII_%20DiscussionpaperonPhase2forUNForum_FINAL.pdf, at p. 7.

[8] See A/HRC/32/19 and Add.1.

6. The second phase of the project builds upon OHCHR's earlier work on judicial mechanisms.[9] Although judicial mechanisms and State-based non-judicial mechanisms are conceptually and functionally distinct, access to effective remedy can be enhanced by creating opportunities, where appropriate, for State-based non-judicial mechanisms to make use of and contribute to judicial processes. Consistent with the position taken in the Guiding Principles that effective judicial mechanisms are the "at the core" of ensuring access to remedy, the recommended action in the annex to the High Commissioner's main report presumes the existence of effective domestic law regimes and judicial mechanisms. The recommended action in the annexes of the High Commissioner's two reports[10] should therefore not be treated as separate, but as mutually reinforcing and complementary.

Terminology and numbering used in the report and this addendum

This explanatory addendum provides background and contextual information with respect to each of the policy objectives and supporting elements found in the annex to A/HRC/38/20. In the annex, the policy objectives are indicated in bold, and their supporting elements (designed to show how the policy elements can be implemented in practice) are the numbered paragraphs that follow. These supporting elements are referenced in this addendum by the term "para.". Thus, a reference in this addendum to "para. 1.1" is a reference to the first supporting element under Policy Objective 1 in the annex to A/HRC/38/20.

B. Recognizing the diversity of State-based non-judicial mechanisms and their legal and regulatory settings

Box 1: Key concepts 1

"State-based non-judicial mechanisms" are mechanisms by which individuals and/or communities whose human rights have been adversely impacted by business activities can seek a remedy. State-based non-judicial mechanisms are distinguishable from *judicial mechanisms* (i.e. courts) by being administered by and answerable to the executive rather than judicial branch of government. The involvement of the State in their establishment and at least some aspects of their operation or administration, distinguish them from *non-State-based grievance mechanisms*.

7. There are many differences between States in legal structures, cultures, traditions, resources and stages of development, all of which have implications for the issues covered in the High Commissioner's main report (A/HRC/38/20).

8. Analysis of best practices and opportunities to improve the effectiveness of State-based non-judicial mechanisms is complicated by their diversity.[11] There is no "one-size-fits -all" approach. For example, recommended action relevant to regulatory or enforcement-type mechanisms (i.e. which derive legal authority from domestic legal regimes) will not necessarily be applicable to, or appropriate for, mediation-type mechanisms lacking formal powers of investigation and enforcement or which rely for their effectiveness on "soft law" or reputational drivers. For these reasons, the policy objectives and supporting elements in A/HRC/38/20, annex are deliberately flexible. Parts of the recommended action are subject to certain caveats (for example, that they be implemented to the extent "relevant and appropriate" in light of the mechanism's particular "mandate and functions").

[9] See A/HRC/32/19 and Add.1

[10] I.e. A/HRC/32/19 (Accountability and Remedy Project, Part I) and A/HRC/38/20 (Accountability and Remedy Project, Part II).

[11] See A/HRC/38/20, paragraphs 6-10.

9. The recommended action[12] stresses the importance of comprehensive and coherent approaches by States towards the use of State-based non-judicial mechanisms to improve accountability and remedy with regard to business-related human rights abuses, consistent with the State's international legal obligations and policy commitments and responsive to local needs. Identifying areas for improvement is a complex task, especially given the range of different regulatory regimes and areas that could be engaged. The recommended action suggests the use of a review process to identify priority areas for action (para. 1.1). In some jurisdictions, a formal legal review may be necessary. To assist with this, a model terms of reference for a formal legal review of the scope, functions and effectiveness of State-based non-judicial mechanisms is included in figure 1, below.

Figure 1: Model terms of reference addressed to a suitable review body (e.g. Ministry of Justice, law commission or domestic equivalent) to enable a review of the scope, functions and effectiveness of State-based non-judicial mechanisms relevant to business respect for human rights

1. The review body is requested to investigate and report on the following matters:

(a) How do State-based non-judicial mechanisms established in the jurisdiction currently contribute to the effective implementation of the State's international legal obligations and policy commitments with respect to accountability and remedy in cases of business-related human rights abuses?

(b) Do State-based non-judicial mechanisms established in the jurisdiction have the necessary functions, powers and resources to fulfil the mandates assigned to them? If not, what reforms or improvements could be considered?

(c) Is the present State-based system for remedy of business-related human rights abuse (i.e. comprising judicial mechanisms and State-based non-judicial mechanisms) a comprehensive and coherent one? Do State-based non-judicial mechanisms complement and support judicial mechanisms in a manner that enhances accountability and access to remedy for business-related human rights abuses? If not, what reforms or improvements could be considered to make the State-based system more effective?

(d) Are State-based non-judicial mechanisms sufficiently responsive to local needs, human rights risks and operating conditions (and particularly the type, nature and severity of human rights risks posed by the activities of business enterprises within the jurisdiction)? If not, what reforms or improvement could be considered to make these mechanisms more effective?

(e) Do State-based non-judicial mechanisms respond adequately to the challenges of investigating allegations and/or handling complaints and/or resolving disputes in cases of business-related human rights abuses where the relevant parties, evidence, and/or adverse human rights impacts are located in more than one State? If not, what reforms or improvements could be considered to make these mechanisms more effective?

(f) Do the remedies that may be obtained through State-based non-judicial mechanisms in cases of business-related human rights abuses meet applicable international standards as regards the substantive and procedural requirements of an effective remedy? Are they sufficiently responsive to gender issues and the needs of individuals or groups at heightened risk of vulnerability or marginalization? If not, what reforms or improvements could be considered to make these mechanisms more effective?

2. The review body is requested to make recommendations that take into account:

(a) The UN Guiding Principles on Business and Human Rights

(b) Other applicable international standards and guidance relating to corporate

[12] A/HRC/38/20, annex

accountability and access to remedy in cases of business-related human rights abuses;

(c) Where relevant, the commitments made by the jurisdiction in its national action plan;

(d) Its findings in relation to the issues described in paragraph 1 above;

(e) International human rights treaties and other relevant treaties, bilateral and multilateral agreements that the State is party to, including, where appropriate, relevant recommendations made to the State by relevant treaty bodies and peer review mechanisms

3. The review process will be public, open, inclusive and evidence-based and will involve:

(a) A review structure that will provide adequate opportunities for contribution by key stakeholders;

(b) Proper consultation with legal professionals, criminal justice practitioners, public interest lawyers, members of the judiciary, parliamentarians, academics, rights-holders and their representatives, national human rights institutions, civil society organizations, representatives of trade unions and representatives of businesses;

(c) An examination of evidence from research, including evidence of experiences in other States with the establishment and administration of State-based non-judicial mechanisms relevant to business respect for human rights

II. Explanatory notes to the recommended action (A/HRC/38/20, annex)

A. Improving the effectiveness of State-based non-judicial mechanisms within the context of the State's broader system of laws, policies and regulatory institutions

Box 2: Key concepts 2

"Overlapping proceedings" refers to two or more sets of complaints-handling and/or dispute resolution proceedings or processes taking place in two or more settings, arising from a single event and/or similar sets of circumstances and which involve the same business enterprises.

"Representatives" in relation to a rights-holder refers to third parties who are authorised or entitled to represent and/or assist that rights-holder in connection with complaints-handling and/or dispute resolution processes of State-based non-judicial mechanisms such as legal counsel, representatives of civil society organisations or family members.

"Rights-holders" refers to the intended beneficiaries of State-based non-judicial mechanisms, particularly those whose human rights have been adversely impacted (or are at risk of being adversely impacted) by business activities.

"Stakeholders" includes rights-holders and their representatives or other persons who have an interest in the effectiveness of State-based non-judicial mechanisms as a means to enhance accountability and remedy in business and human rights cases, such as business enterprises, local communities and civil society organisations

1. Systemic effectiveness and policy coherence generally

10. There is great diversity in State-based non-judicial mechanisms relevant to business and human rights. The information-gathering activities conducted by OHCHR in phase two of the Accountability and Remedy Project identified multiple State-based non-judicial mechanisms relevant to addressing adverse human rights impacts of business activities for each jurisdiction reviewed.[13]

11. These State-based non-judicial mechanisms play an important role in implementing States' international law obligations and policy commitments with respect to protecting against human rights abuses within their respective territories and/or jurisdictions and ensuring access to remedy when such abuses take place.

12. As a first step, it is important that States are able to identify the various State-based non-judicial mechanisms operating in their respective jurisdictions that are relevant to business respect for human rights, as not all will express their mandates in explicitly human rights terms.

13. For this reason, the recommended action begins by focusing on alignment needed between the collective activities of relevant State-based non-judicial mechanisms (each with their own specific mandates and functions) and the State's international legal obligations and policy commitments relevant to business and human rights. The recommended action under policy objective 1 envisages an inclusive, evidence-based process to clarify the types of State-based non-judicial mechanisms operating within the relevant jurisdiction, and whether they are sufficiently robust and appropriate to the local context, and meeting the needs of rights-holders (para. 1.1). Further suggestions for such a review process can be found in the model terms of reference above (see Fig. 1). This process could take place as part of a national action plan on business and human rights,[14] or as part of strategies to improve access to remedy more generally. The action needed to address any deficiencies identified through the relevant review process (para. 1.2) will vary depending on local legal structures, traditions, human rights risks, and needs.

14. Few (if any) State-based non-judicial mechanisms operate in isolation. On the contrary, they are integral to well-functioning regulatory systems. Phase two of the Accountability and Remedy Project identified various ways in which the effectiveness of accountability and remedy systems can be improved by enhanced communication, cooperation and coordination between different State-based mechanisms and agencies relevant to business and human rights. Depending on the mandates and functions of the mechanisms and agencies in question, this interaction can take the form of sharing information that may help to improve the detection of breaches, assisting with investigations, raising awareness about systemic or market-related issues that may be undermining the effectiveness of regulatory initiatives, and sharing lessons learned with a view to improving effectiveness. However, the extent to which such communication, cooperation and coordination should take place is not always clear. The recommended action encourages States to consider the potential benefits of greater engagement and cooperation between different mechanisms and agencies and to take appropriate steps to facilitate this. This could be both horizontally (i.e. between mechanisms and agencies operating at the same level of government) and between mechanisms and agencies operating at different levels (for example, in a federal system, between the national and regional levels of government) (para. 1.3).

15. To enable State-based non-judicial mechanisms to continue to fulfil their mandates and to meet the needs of rights-holders in evolving circumstances, States should keep the performance of such mechanisms under review. The recommended action provides a list of areas that could be considered as part of such a review, all of which will have a bearing on, and provide valuable insights into, the extent to which these mechanisms are contributing

[13] See A/HRC/38/20, paragraphs 6 -10

[14] See UN Working Group on Business and Human Rights, 'Guidance on National Action Plans on Business and Human Rights', December 2014, copy available at http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf.

effectively to a coherent and comprehensive State-based system for accountability and remedy in business and human rights cases (para. 1.4). (Note that Part I of the recommended action is concerned with the *overall contribution* of State-based non-judicial mechanisms to this system (i.e. questions of *systemic effectiveness*). Part II of the recommended action provides further guidance with respect to the *effectiveness of individual mechanisms*).

2. The need for realistic and readily-identifiable pathways to an effective remedy

Box 3: Key concepts 3

A "period of limitation" refers to the time limit within which a complaint or dispute must have been initiated to be valid. It may run from the time that the relevant abuse occurred, or from the time that the harm materialised, or from the time the harm or abuse became known to the affected person.

"Remedy pathway", in the case of a business-related human rights abuse, refers to the various mechanisms and processes that are used to ascertain the relevant facts and to determine, mediate and/or agree upon (depending on the nature of the processes involved) a remedial outcome. A remedy pathway may not be confined to one mechanism. In some cases, it may involve a combination of mechanisms (including judicial mechanisms and non-State-based mechanisms). A remedy pathway includes all steps from the initiation of a complaint and/or dispute to a final determination, agreement or settlement (as provided for by the relevant mechanisms and processes), including any relevant appeal or review processes.

"Remedial outcome" refers to the outcome reached at the conclusion of a remedial process or series of related processes. Remedial outcomes can be divided into two main categories: financial remedies (punitive or compensatory) and non-financial remedies (for example, restitution; measures to assist with rehabilitation of victims and/or resources; satisfaction, including public apologies; and guarantees of non-repetition).

"Standing", in relation to a State-based non-judicial mechanism, refers to the rules that govern who has the right to initiate a complaint-handling and/or or dispute resolution process under that mechanism's procedures

16. States should consider the possibility that there may be circumstances and settings in which meeting their obligations to provide access to effective remedies means providing rights-holders with a range of remedial options and choices, and providing flexibility for affected individuals and/or communities to decide on a remedial strategy that best meets their needs. Individually or in combination (as the case may be) those options need to offer rights-holders a pathway to remedy that is both realistic and readily-identifiable (policy objective 2).

17. In order for rights-holders and other stakeholders to make effective use of State-based non-judicial mechanisms, and to realistically evaluate the different options open to them (including the likelihood of different remedial outcomes) they require easy access to clear and readily understandable information about the existence, mandates, functions and powers of the different State-based non-judicial mechanisms that may be relevant.

18. For these reasons, the recommended action under policy objective 2 focuses on steps to enable rights-holders to identify the remedial options and remedy pathways most suitable to them, in light of the circumstances. Supporting elements (paras. 2.1, 2.2 and 2.3) are concerned with making information, and advisory and support services available to rights-holders in a proactive manner. Phase two of the Accountability and Remedy Project gathered information on a range of techniques used to communicate with rights-holders on different remedy pathways and options, including regional and local advice centres, toll-free telephone lines, on-line resources, "plain language" pamphlets, downloadable

information packs, and use of dedicated case-workers.[15] The most suitable providers of information and advice will vary depending on the legal structures and existing institutions of the State concerned. However, in many jurisdictions and contexts, NHRIs and other bodies with mandates expressed in human rights terms are likely to have an important role to play. Physical outreach activities (e.g. travelling "road shows", regional offices or partnerships with local civil society organisations) are frequently a key component of effective outreach strategies involving remote communities.

19. In some cases, and particularly in serious and/or complex cases, more than one mechanism, law enforcement body or regulatory agency may need to become involved. In such cases, "an understanding of the linkages and synergies in play between different bodies and mechanisms will be key."[16] The recommended action therefore includes a provision aimed at enhancing cooperation and coordination between the various mechanisms, bodies and agencies concerned (para. 2.4) and highlights a number of factors that may be taken into account in deciding the most appropriate and effective modes of cooperation and coordination. It is important that such coordination and cooperation operates as smoothly and seamlessly as possible, and does not introduce further barriers (e.g. in the form of unnecessary delays) to these processes.[17]

3. Linkages and differentiation between State-based non-judicial mechanisms and judicial mechanisms

20. In phase two of the Accountability and Remedy Project, OHCHR defined State-based non-judicial mechanisms as mechanisms administered and answerable to the executive (i.e. ministerial) rather than judicial branch of government.[18] However, this definition is not always easily applied in practice, owing to the growing use, in some jurisdictions, of "hybrid" mechanisms which operate as courts and have financial and/or administrative relationships with judicial mechanisms and/or the judiciary but which are also connected in some way to domestic executive agencies.[19]

21. After reiterating the complementary and supporting role of State-based non-judicial mechanisms vis-à-vis judicial mechanisms[20], (policy objective 3), the recommended action highlights the need for clear delineation between the roles and responsibilities of these mechanisms (para. 3.1). This is important for several reasons: because of constitutional principles of "separation of powers" (and/or other legal principles aimed at creating checks and balances on the use of governmental authority); because rights-holders and other stakeholders require clarity about their respective roles and responsibilities in order to use them effectively; and because of the possibility of overlapping proceedings[21] taking place in both judicial mechanisms and State-based non-judicial mechanisms.

22. However, the recommended action recognises that there will be circumstances (for example, cases of complicity in international crimes, or causing or contributing to other serious abuses of human rights), in which judicial remedy is the only effective remedy. It is particularly important that State-based non-judicial mechanisms (and their respective

---

[15] See the discussion paper prepared by OHCHR for the 6th Annual UN Annual Forum on Business and Human Rights, note 8 above, p. 23.

[16] See the OHCHR, 'Accountability and Remedy Project Part II: How State-based NJMs respond to sectors with high risks of adverse human rights impacts', available at https://www.business-humanrights.org/sites/default/files/documents/ARPII_phase1_Sector%20Study_Part%201.pdf, pp. 20-23.

[17] See paragraph 31 below.

[18] See Box 1 above.

[19] See OHCHR "Access to Remedy for Business-Related Human Rights Abuses: A Scoping Paper", 17 February 2017, available at https://www.business-humanrights.org/sites/default/files/images/ARPII_FINAL%20Scoping%20Paper.pdf, at p. 2, 24. 29.

[20] See A/HRC/17/31, principle 27, commentary

[21] See Box 2 above.

processes or procedures) do not prevent or limit access by rights-holders or their representatives to judicial mechanisms in such cases (para. 3.1)[22]

23. The doctrine of separation of powers is a constitutional principle applicable in many jurisdictions under which different branches of government (legislative, executive and judicial) are separate from each other to prevent abuses of power. Consequently, interactions between the different types of mechanism (i.e. judicial and non-judicial) that amount to undue interference in their respective functions and powers (and particularly interference by executive agencies in the workings of the judiciary) would be prohibited.

24. In practice, however, the processes of State-based non-judicial mechanisms and judicial mechanisms can be interlinked, for example where State-based non-judicial mechanisms are granted powers (a) to recommend criminal or quasi-criminal (i.e. administrative) proceedings; (b) to refer evidence of corporate wrongdoing to law enforcement authorities; (c) to act as a prosecutor in a criminal or quasi-criminal case; (d) to give evidence as a witness in judicial processes; (e) to intervene in judicial cases (e.g. as amicus curiae); (f) to undertake public interest civil litigation on the part of claimants or complainants; or (g) to report or refer cases of non-cooperation or obstruction of its processes for further action through judicial mechanisms. The recommended action calls on States to ensure that such options are available (to the extent relevant to the respective mandates and functions of the relevant mechanisms) (para. 3.5) and that transfers and referrals between State-based non-judicial mechanisms and judicial mechanisms take place in a manner which takes due account of the rights, interests and preferences of rights-holders (para. 3.3). These provisions should be read in conjunction with the recommended action relating to remedy pathways (see policy objective 2).

25. Conversely, judicial mechanisms can support the activities of State-based non-judicial mechanisms in a range of ways, including (where permitted under the domestic legal regime) by providing a route through which State-based mechanisms can compel the production of evidence (e.g. granting of a search warrant), and/or by providing a means of enforcement of remedies awarded or determined through non-judicial processes (para. 3.2). Judicial mechanisms can make an important contribution to the ability of certain State-based non-judicial mechanisms to provide remedial outcomes aligned with principles of adequate, effective and prompt reparations for harm suffered.[23] For instance, some State-based non-judicial mechanisms may have the ability to seek emergency orders from a court to prevent the continuation of a business-related human rights abuse. Moreover, State-based non-judicial mechanisms charged with the enforcement of binding legal standards may be able to seek assistance from judicial mechanisms in the enforcement of remedial outcomes.

26. Consistent with the approach to remedy pathways generally,[24] and to enable rights-holders and stakeholders to make effective use of State-based non-judicial mechanisms, the recommended action highlights the importance of access to information on the different circumstances in which (and the stages at which) judicial mechanisms may become involved in a complaint or dispute, and their rights to challenge decisions about transfers or referrals of complaints or disputes to other bodies (para. 3.4).

27. Overlapping proceedings can be problematic for several reasons. First, a lack of clarity on treatment of disclosures or admissions beyond the confines of the relevant proceedings may cause dilemmas for business enterprises as to whether and how to engage with the relevant mechanism. Second, because the prospect of inconsistent findings and/or remedial outcomes from overlapping processes is not only potentially contrary to principles of fairness and legal certainty, it can also undermine the effectiveness of remedies in individual cases. For these reasons, the recommended action highlights the need for States to anticipate and make appropriate provision for overlapping proceedings in the procedural

[22] See also A/HRC/17/31, principle 26, commentary.

[23] See paragraphs 30 and 31 below.

[24] See paragraphs 16-19 above.

rules of both judicial mechanisms and State-based non-judicial mechanisms consistent with standards of fairness, predictability, rights-compatibility and transparency (para. 3.6).

28. The remaining elements under policy objective 3 (paras. 3.7 and 3.8) are designed to encourage States to reflect on how the use of legal waivers, and procedures for transfer or referral of proceedings between different mechanisms may introduce further barriers to remedy. For instance, the imposition of a period of limitation[25] that does not take account of time spent exploring other remedial options, or subjecting parties to excessive delays in the course of a transfer or referral process, or unnecessary duplication of procedural steps, are examples of the kinds of potential barriers to remedy that States are encouraged to address.

4. Determination and enforcement of remedial outcomes

29. The recommended action under policy objective 4 calls on States to draw from international standards on access to remedy for human rights abuses as they consider how best to make use of State-based non-judicial mechanisms in business and human rights-related cases and their mandates, functions and powers. This should not be taken to imply that every State-based non-judicial mechanism must provide the full range of reparations contemplated in international standards. The types of remedies available, and the means by which they are implemented in individual cases, will depend on the mandates, functions and powers of the relevant mechanisms. The aim is to encourage States to consider ways in which accountability and remedy systems as a whole (which, as noted above, may include a range of different remedial options and pathways involving both judicial and non-judicial mechanisms), can offer a range of remedial outcomes, maximising the potential for delivery of effective remedies in individual cases by providing rights-holders with the range of options needed to enable them to seek and obtain remedies that meet their needs (para. 4.1).

30. The extent to which State-based non-judicial mechanisms take responsibility for overseeing implementation of remedial outcomes varies from one mechanism to another. Some (typically regulatory-type bodies) have self-executing powers of enforcement, whereas others (typically mediation-type bodies) have the ability and/or authority to carry out only minimal (if any) follow up. The recommended action recognises that different types of mechanisms have different roles to play but calls on States to take appropriate and timely steps to address the risk of non-implementation of remedial outcomes (para. 4.2). This provision should be read in conjunction with the recommended action on the ability of State-based non-judicial mechanisms to seek assistance from, to transfer and to refer matters to, judicial mechanisms (paras. 3.2, 3.3 and 3.4)[26] and also the recommended action under policy objective 2 (see paragraphs 16 to 19 above) relating to remedy pathways.

B. Improving the effectiveness of individual State-based non-judicial mechanisms relevant to the respect by business enterprises for human rights

1. Implementing the effectiveness criteria set out in the Guiding Principles for non-judicial mechanisms.

31. Principle 31 of the Guiding Principles[27] lays down seven effectiveness criteria applicable to State/based non-judicial mechanisms relevant to business respect for human rights: legitimacy; accessibility; predictability; equitability; transparency; rights-compatibility; and continuous learning (the "effectiveness criteria").

32. The recommended action under policy objective 5 highlights the importance of the effectiveness criteria as a benchmark (para. 5.1). It also takes account of the fact that some State-based non-judicial mechanisms are subject to regular review (e.g. performance or

[25] See Box 3 above.
[26] See paragraphs 25-27 above.
[27] See A/HRC/17/31, annex.

effectiveness reviews) by designated oversight bodies (e.g. treaty bodies or parliamentary bodies) or peer review bodies (para. 5.2).

33. During phase two of the Accountability and Remedy Project, OHCHR gathered information from State-based non-judicial mechanisms operating in a wide range of jurisdictions (representing different geographic regions and different domestic legal structures and traditions) about how they meet different aspects of the effectiveness criteria in practice.

34. Drawing from this information, the recommended actions under policy objectives 6 to 11 provide States with a series of illustrative examples as to the practical steps States can consider in order to improve the effectiveness of their State-based non-judicial mechanisms in general and their implementation of Guiding Principle 31[28] in particular.

2. Legitimacy (Guiding Principle 31(a))

35. As noted above,[29] a defining feature of a State-based non-judicial mechanism (as opposed to a judicial mechanism) is its relationship with the executive (rather than judicial) branch of government. This raises questions as to the appropriate level of independence of operation, in light of its particular mandate, functions and powers, to ensure that the mechanism has legitimacy and trust in the eyes of stakeholders.[30]

36. The recommended action under policy objective 6 makes a number of suggestions as to different ways to help strengthen and build stakeholder trust in State-based non-judicial mechanisms. These include providing the mechanism with sufficient resources and reflecting on the structural, institutional, governance, administrative and staffing arrangements needed to provide an appropriate level of operational autonomy (para. 6.1).

37. The manner in which a State-based non-judicial mechanism discharges its functions, particularly in the context of contested allegations, is relevant to building and maintaining stakeholder trust and enhancing legitimacy. The recommended action identifies a number of principles to govern the exercise of any powers of investigation that have been conferred (para. 6.2).

38. The extent to which a mechanism should be able to act independently and proactively, and the steps needed to achieve this, will vary depending on the nature of the mechanism and its mandate. Independent appointment panels for board members, or stakeholder representation on governing bodies, or the use of independent monitoring or advisory bodies, might work well in some settings, but will not necessarily be appropriate in others. The recommended action suggests that, where appropriate, provision should be made for rights-holders and other stakeholders to be able to raise concerns or complaints about different aspects of the performance or administration of State-based non judicial mechanisms (para. 6.3) or to request a review of specific decisions or determinations (para. 6.4). In some settings, the creation of a peer review system assessing a mechanism's performance has been valuable to drive up standards (para. 6.5).[31] These processes are distinct from the overall systemic review referred to under policy objective 1 (see para. 1.4 and paragraph 15 above).

39. The recommended action highlights the need for robust policies and procedures on conflicts of interest (para. 6.6). Depending on the structure and activities of the State-based non-judicial mechanism concerned, this could include employment and disciplinary policies and procedures, internal rotation of key personnel, and in some cases, the need for separation of functions to maintain the objectivity and independence of enforcement personnel.

---

[28] See A/HRC/17/31, annex.

[29] See Box 1 above.

[30] See UN Guiding Principles on Business and Human Rights, Guiding Principles 31, Commentary (a).

[31] See, for instance, the peer review mechanism established for national contact points charged with advising on and promoting implementation of the Guidelines on Multinational Enterprises of the Organization for Economic Cooperation and Development.

3. Accessibility (Guiding Principles 31(b))

40. The Guiding Principles draws particular attention to the problem of "lack of awareness of the mechanism, language, literacy, costs, physical location and fears of reprisal".[32] The recommended action under policy objective 7 sets out practical steps to improve accessibility of individual State-based non-judicial mechanisms, drawing from existing State practice. These include working proactively to raise awareness among rights-holders about their mandates, functions and activities (para. 7.1),[33] taking steps to reduce, as far as possible, the costs of accessing such mechanisms (paras. 7.2 and 7.3),[34] giving publicity to sources of financial assistance (para. 7.3), and making processes as simple and straightforward as possible to reduce the need for legal counsel, where appropriate,[35] while at the same time preserving the possibility of assistance from third parties (such as family members, carers or interpreters) (para. 7.4). Flexible rules on standing (i.e. allowing certain persons or entities to bring a claim on someone else's behalf) can help to improve access to remedy for people who fear acts of intimidation and reprisals. Other steps that can be taken to improve accessibility include giving people choice on how to engage with mechanisms (e.g. on-line, by phone, in person, by letter) (para. 7.5) and offering special assistance services such as dedicated caseworkers, downloadable "self-help" kits or support through "triage" systems (para. 7.6).[36] The recommended action stresses the importance of materials and resources being made available in different formats to meet the needs of persons with disabilities (para. 7.7) and adjustments to premises and facilities to improve physical and communicational accessibility (para. 7.9).

41. Some State-based non-judicial mechanisms impose periods of limitation on complaints or disputes. The recommended action draws attention to the potential for such procedural rules to undermine accessibility of State-based non-judicial mechanisms and suggests issues to be taken into account in setting a period of limitation (para. 7.8).

42. The recommended action highlights the importance of taking steps to protect confidentiality in certain cases as well as appropriate policies to ensure the physical safety and well-being of rights-holders (particularly those who may be at heightened risk of vulnerability or marginalization), as they engage with the relevant mechanism and its personnel (para. 7.10). Such policies should be clearly communicated to all relevant personnel, and appropriately linked to relevant complaints and disciplinary procedures, in accordance with the law and good management practice. Robust background legislation and enforcement regimes relating to confidentiality, privacy, safeguarding, and whistle-blower protection can contribute to the accessibility of State-based non-judicial mechanisms in practice (paras. 7.11 and. 7.12).

4. Predictability (Guiding Principle 31 (c))

43. OHCHR research into State/based non-judicial mechanism "best practice" suggests that the need for clarity with respect to procedure and relevant time frames is already widely recognised. Many State-based non-judicial mechanisms make use of a variety of means to inform rights-holders and other stakeholders about processes and procedures, including through on-line resources, videos and "what to expect" leaflets The recommended action under policy objective 8 makes a number of suggestions as to

---

[32] See A/HRC/17/31, principle 31 commentary

[33] See also paras. 2.1, 2.2 and 2.3 of the recommended action, which concerns the need for rights-holders to have access to information about the different remedial courses of action potentially open to them, and the advantages and disadvantages of each.

[34] E.g. user fees, costs of legal counsel, translation costs, cost of expert witnesses, travel and accommodation costs, and costs associated with preparation and submission of documents and testimony.

[35] Note that for regulatory or enforcement-type cases (as opposed to dispute resolution type processes), prosecution of the matter will often be in the hands of the mechanism itself, in many cases negating the need for rights-holders to retain their own legal counsel.

[36] Note that this part of the recommended action is distinct from, though related to, the elements under policy objective 2 (paras. 2.1, 2.2 and 2.3) relating to information, advice and support to rights-holders to help with the identification of potential remedy pathways.

information that should be conveyed to rights-holders and other stakeholders in the interests of predictability (para. 8.1)

44. In some contexts the publication of information about past cases (e.g. how they were handled, and the remedial outcomes) can help improve predictability, and trust in, the processes of State-based non-judicial mechanisms. However this will not be appropriate to all kinds of State-based non-judicial mechanisms (e.g. mediation type mechanisms that rely for their effectiveness on the willingness of parties to participate based on assurances of confidentiality). In some contexts and circumstances, publication of information identifying the complainant or witnesses may be inappropriate, counter-productive or unlawful. The recommended action is designed to encourage States to reflect on the level of publication (e.g. using redacted information or aggregated information) that may be appropriate and desirable to enhance public understanding of the complaints handling and/or dispute resolution processes and methodologies in use, and to make this information available in a readily understandable format (para. 8.2).

5. Equitability (Guiding Principle 31(d))

45. As the Guiding Principles note, "in grievances or disputes between business enterprises and affected stakeholders, the latter frequently have much less access to information and expert resources, and often lack the financial resources to pay for them".[37] The recommended action in policy objective 9 highlights the importance of access to information about sources of advice and assistance to enable rights-holders to participate fairly and effectively in mechanisms' processes (para. 9.1).

46. Research in phase two of the Accountability and Remedy project suggests that there is a high degree of consensus from jurisdiction to jurisdiction as to the basic elements of procedural fairness. The recommended action draws from these findings and highlights the need for procedures to provide for adequate and timely provision of information, opportunities to comment before decisions are made, written reasons for final determination and rights of parties to challenge decisions (para. 9.2).

47. Procedural rules that commit rights-holders to pursuing remedies through non-judicial mechanisms, and which remove the option of judicial recourse, can present serious barriers to effective remedy. The recommended action highlights the need for rights-holders to have the flexibility to withdraw from non-judicial mechanisms in certain circumstances and to retain the right to seek remedies using judicial mechanisms (para. 9.3).[38] This provision should be read in conjunction with the recommended action under policy objective 3 (particularly paras. 3.6, 3.7 and 3.8).

48. Fairness can be undermined if decision-makers within State-based non-judicial mechanisms are faced with conflicts of interest. The recommended action draws attention to the need for suitable policies, procedures and practices to ensure that conflicts are identified and declared, and that the mechanism responds appropriately (para. 9.4).

6. Transparency (Guiding Principle 31(e))

49. In practice, State-based non-judicial mechanisms can take a number of different steps to improve transparency, not just in handling specific complaints and/or dispute resolution processes but also with respect to their operating policies, procedures and wider performance and impact. Some State-based non-judicial mechanisms have been making use of new technologies to improve the speed, effectiveness and communication between themselves and relevant stakeholder groups. Innovations include e-filing systems, video-conferencing and password protected on-line accounts to enable participants in complaints handling or dispute resolution processes to track the progress of procedures and to respond more easily to requests for information.

---

[37] A/HRC/17/31, principle 31, commentary (d).

[38] See also comments above on remedy pathways and the need to offer some degree of choice to rights-holders (paragraphs 16-19 above) and also need to take account of the fact that there will be cases in which judicial remedy is the only effective remedy (paragraph 23 above).

50. The recommended action in policy objective 10 highlights steps to enhance transparency of State-based non-judicial mechanisms. These include working proactively to ensure that information useful to rights-holders and their representatives is conveyed to the relevant individuals and communities in a readily understandable format (para. 10.1), keeping participants in processes informed of key developments and requirements (para. 10.2) and publishing periodic (typically annual) reports on activities and performance (para. 10.3).

51. The recommended action also highlights the importance of domestic legal regimes relating to freedom of access to government information as a means of enhancing transparency of State-based non-judicial mechanisms in general (para. 10.4).

7. Rights-compatibility (Guiding Principle 31(f))

52. The Guiding Principles observes that "grievances are frequently not framed in human rights terms and many do not initially raise human rights concerns. Regardless, where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognised human rights"[39] The recommended action under policy objective 11 therefore reminds States of the need for State-based non-judicial mechanisms to be administered, and to be given mandates and functions, that are consistent with international human rights standards (para. 11.1), and aligned with internationally recognised procedural and substantive components of an effective remedy (para. 11.2).

53. Additionally it reflects elements of good practice identified in the course of phase two of the Accountability and Remedy Project, which are relevant to the international standard of "prompt, adequate and effective" remedy in cases of human rights violations. There is a need to ensure that requests by rights-holders and their representatives are responded to in a timely fashion (para. 11.3). Where relevant, in light of the mandate, functions and powers of the mechanisms in question, there should also be provision for prioritisation of responses and/or preventative action in cases posing a risk of severe or irremediable harm (para. 11.3).

54. Depending on their mandate and functions, State-based non-judicial mechanisms may be able to offer a range of remedies including regulatory, restorative and/or preventative remedies as well as financial remedies (punitive and/or compensatory). The recommended action recognises that the eventual realisation of a remedy both "adequate" and "effective" is more likely with the active and meaningful involvement of the affected rights-holders and their representatives (para. 11.3).

55. The recommended action also encourages States to reflect on the different ways in which creating opportunities for consultation with rights-holders can enhance accountability and access to remedy. For instance, State-based non-judicial mechanisms which may abandon, defer or settle claims and/or disputes at their own initiative (including subject to terms) should be prepared to consult rights-holders and their representatives in advance of a decision not to proceed with a complaints handling or dispute resolution process (e.g. because of an agreement between the mechanism and the business enterprise concerned to defer proceedings pending an attempt to achieve compliance) (para. 11.3). Moreover, the recommended action suggests that the availability of effective remedies through other means should be considered in a decision whether or not to bring an end to, or defer, a process (para. 11.4).

56. Not all of the relevant State-based non-judicial mechanisms have mandates that are explicitly framed in human rights terms. Within such mechanisms, there may not be the necessary levels of awareness among key personnel and decision-makers of the mechanism's role and responsibilities with respect to human rights. However, some State-based non-judicial mechanisms have taken steps to raise awareness among staff about relevant human rights standards (e.g. obligations with respect to non-discrimination, or indigenous peoples' rights) and the practical steps that can be taken to ensure that complaints and disputes are handled and progressed in a rights compatible way. The

[39] A/HRC/17/31, principle 31, commentary (f)

recommended action highlights the importance of staff training programmes on human rights issues generally and the cultural needs and preferences of the communities served by the relevant mechanisms, as well as the need to ensure that personnel have access to relevant human rights expertise as needed (para. 11.5). NHRIs have a potentially important role to play in this regard.

8. Continuous learning (Guiding Principle 31(g))

57. Not all State-based non-judicial mechanisms have policy making and advisory functions. Nevertheless, the recommended action under policy objective 12 reminds States that State-based non-judicial mechanisms can be a vital source of information with respect to the effectiveness or otherwise of different regulatory strategies and techniques, in different sectors and operating contexts. They are also a potentially important source of expertise when it comes to the formulation of law reforms aimed at improving the effectiveness of State-based mechanisms and enhancing their contribution to accountability and remedy in business and human rights cases (para. 12.1). In light of this, the recommended action suggests that State-based non-judicial mechanisms be asked, where relevant and appropriate, to report upon and make recommendations with respect to compliance related issues apparent in their various activities (para. 12.2). States are also encouraged to take steps to enable greater dissemination of know-how and lessons learnt by State-based non-judicial mechanisms among other domestic bodies and regulatory agencies that play a part in raising standards of business enterprises with respect to human rights.

C. Improving the effectiveness of State-based non-judicial mechanisms in cross-border cases

Box 4: Key concepts 4

"Cross-border cases" refers to complaints and/or disputes arising from business-related human rights abuses in which the relevant actors, evidence, facts, harms, and/or witnesses are located in more than one State.

Issues relevant to cross-border cooperation between State-based non-judicial mechanisms

58. Few State-based non-judicial mechanisms have mandates relating to extraterritorial business-related human rights abuses. A notable exception is the national contact point (NCP) system established to promote and assist with the implementation of the Guidelines on Multinational Enterprises of the OECD (the "OECD Guidelines"). National contact points based in the jurisdictions of adhering States to the OECD Guidelines have been called upon to handle complaints on allegations of business involvement in human rights abuses in other States (including non-adhering States) on a number of occasions.[40]

59. However, there have recently been instances in which State-based non-judicial mechanisms (and particularly NHRIs) have entered into ad hoc arrangements with regulatory agencies from other States to address business and human rights challenges that appear to be cross-border in nature.

60. The recommended action under policy objective 13 encourages States to support the involvement of State-based non-judicial mechanisms in cross-border cases where their mandates and functions permits, and to make appropriate adjustments to the mandates and functions of these mechanisms to enhance their ability to respond to cross-border human rights risks in the future (para. 13.1).

[40] OECD (2017), *Annual Report on the OECD Guidelines for Multinational Enterprises 2016*, available at http://www.oecd.org/daf/inv/mne/2016-Annual-Report-MNE-Guidelines-EN.pdf.

61. Whereas cross-border cooperation in judicial cases is typically formal in nature (for instance, when it makes use of diplomatic channels of communication or relies on international mutual legal assistance regimes),[41] cross-border cooperation by State-based non-judicial mechanisms carries the possibility of greater flexibility, for instance in the use of informal and ad hoc arrangements.

62. In the comparatively limited circumstances in which State-based non-judicial mechanisms can and do involve themselves in cross-border cases, they can face significant practical and logistical challenges when it comes to gathering evidence about extraterritorial business-related human rights abuses. Much depends on the level of cooperation of the authorities in the State where the harm has occurred. In such cases, some NCPs under the OECD Guidelines have found foreign embassies to be a useful source of information and support in practice.

63. Experience within the NCP system has shown that good working relationships between personnel working within State-based non-judicial mechanisms and their counterparts in other States can be promoted through the use of regulatory networks and other regional or multilateral initiatives aimed at encouraging the sharing of know-how on regulatory, complaints handling and dispute resolution best practices and the dissemination of information to stakeholders.

64. For these reasons, the remaining elements under policy objective 13 focus on the action that could enhance the quality and effectiveness of informal contacts between practitioners working within State-based non-judicial mechanisms in different States with a view to creating cultures and relationships that are more supportive of, and provide more opportunities for, joint and/or coordinated responses to cases of business-related human rights abuses that are, or appear to be, cross border in nature (paras. 13.2, 13.3, 13.6 and 13.7). The potential importance of embassies and consular services as a source of assistance (para. 13.4) and as a means of awareness-raising about the complaints handling and dispute resolution options that may be available (para. 13.6) is also recognised.

---

[41] See A/HRC/32/19/Add.1, paragraphs 32-38.

United Nations A/HRC/38/20/Add.2

General Assembly

Distr.: General
1 June 2018

English only

Human Rights Council
Thirty-eighth session
18 June–6 July 2018
Agenda items 2 and 3
Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability

Report of the United Nations High Commissioner for Human Rights

Summary

This report provides analysis and clarification of the relationship between human rights due diligence, as described in the United Nations Guiding Principles on Business and Human Rights, and determinations of corporate liability. It is informed by discussions held during a 2017 consultation convened pursuant to Human Rights Council resolution 32/10 and forms part of the continuation of the work of the Office of the United Nations High Commissioner for Human Rights in the area of accountability and remedy, as also requested by the Human Rights Council in resolution 32/10.

GE.18-08668(E)
1808668

Please recycle

Contents

		Page
I.	Introduction	3
II.	Deconstructing human rights due diligence and its relationship to corporate liability	4
III.	Domestic legal regimes requiring human rights due diligence as a standard of conduct	5
IV.	Human rights due diligence and claims of negligence	6
V.	Human rights due diligence as a possible defense to liability	7
VI.	Human rights due diligence and secondary liability	8
VII.	The role of human rights due diligence in determinations of sanctions and remedies	9
VIII.	Reaching out to practitioners, policymakers, and civil society regarding the role of human rights due diligence in determinations of corporate liability and attendant penalties	10
IX.	Concluding Remarks	11
Annexes		
I.	Relevant Policy Objectives From Accountability and Remedy Project Part I	13
II.	Consultation Agenda	14

I. Introduction

1. Ensuring access to effective remedy for those whose human rights have been adversely impacted by business activities is one of the three Pillars of the United Nations Guiding Principles on Business and Human Rights (UNGPs). In 2014, the Office of the United Nations High Commissioner for Human Rights (OHCHR) launched an initiative, called the Accountability and Remedy Project Part I, aimed at strengthening implementation by States of the third Pillar, specifically with respect to judicial mechanisms. In resolution 26/22 (2014), the Human Rights Council (HRC) requested the High Commissioner to continue his work on this issue and to submit a final report to the Council at its thirty-second session.

2. In June 2016, OHCHR submitted its report to the HRC pursuant to resolution 26/22.[1] The report recognized the urgent need for action by States to ensure that victims of human rights harms connected to business activities have access to effective remedy. The report affirmed the statement from the UNGPs that effective judicial mechanisms are at the core of ensuring access to remedy,[2] while noting that other mechanisms, such as State-based non-judicial mechanisms, should complement judicial remedies.[3]

3. The report offered a set of practical resources which States can draw upon with a view to progressively and systematically improving their implementation of Pillar III, including (i) a model terms of reference for review of the effectiveness of domestic legal systems, (ii) an annex setting out a list of practical steps for States to consider, arranged by themes ("policy objectives") relating to both procedural and substantive aspects of access to remedy, and (iii) an addendum explaining key legal concepts and the main findings emerging from the work in further detail.[4]

4. The HRC, in its resolution 32/10, welcomed OHCHR's work on improving accountability and access to remedy for victims of business-related human rights abuse, noted with appreciation the report, and requested the High Commissioner "to continue his work in this area and to convene two [multi-stakeholder] consultations" following up on the recommendations of the Accountability and Remedy Project Part I.[5]

5. The first consultation focused on a technical issue emerging from the Accountability and Remedy Project research and consultations which has potentially significant implications for the effectiveness of corporate liability regimes relevant to business respect for human rights. The research had identified a need for greater clarity about the different ways in which the exercise of human rights due diligence and corporate legal liability may interrelate, and how to ensure greater policy coherence from States in their approaches to access to remedy and human rights due diligence.[6] Specifically, the report submitted to the HRC recommended that "[t]he principles for assessing corporate liability under domestic public [and private] law regimes [be] properly aligned with the responsibility of companies to exercise human rights due diligence across their operations."[7]

6. The multi-stakeholder consultation was convened at the *Palais des Nations* in October 2017 and was attended by over 60 experts representing States, intergovernmental organizations, national human rights institutions, non-governmental organizations, business, legal practitioners, and academia. The various substantial, procedural, and practical issues discussed are set out further below in sections following the structure of the consultation,[8] followed by concluding remarks on how to further enhance the understanding

[1] A/HRC/32/19; A/HRC/32/19/Add.1.

[2] UN Guiding Principle 26 and Commentary.

[3] *See* UN Guiding Principle 27 and Commentary.

[4] The OHCHR also released a paper providing illustrative examples of what was said in the report.

[5] A/HRC/RES/32/10, para. 13.

[6] *See, e.g.*, A/HRC/32/19/Add.1, paras. 21-23, 55-56.

[7] A/HRC/32/19, Annex, Policy Objectives 3, 14. Annex I of this report reproduces these policy objectives along with their supporting elements.

[8] Annex II of this report contains the agenda of the consultation. The concept note for the meeting is available at http://www.ohchr.org/Documents/Issues/Business/HRDDConsultationConceptNote.pdf.

of the findings contained in the Accountability and Remedy Project report submitted to the HRC in 2016.

II. Deconstructing human rights due diligence and its relationship to corporate liability

7. Human rights due diligence, as described in the UNGPs, refers to the processes and activities by which businesses identify, prevent, mitigate, and account for how they address their adverse human rights impacts.[9] The identification, prevention, and mitigation of adverse human rights impacts, as well as the communication of the effectiveness of these efforts externally, are integral to meeting the corporate responsibility to respect human rights. The UNGPs provide important guidance as to the key elements of human rights due diligence and the basic standards that should be observed.

8. Human rights due diligence should not be confused with other forms of legal due diligence activities, such as those carried out in preparation for corporate mergers and acquisitions, or those required for compliance monitoring purposes in areas such as banking or anti-corruption. The key difference between these concepts is that the latter group is generally concerned with identifying, preventing, and mitigating risks to *business*; whereas human rights due diligence is concerned with risks to *people*, specifically from adverse human rights impacts that a business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products, or services by its business relationships. As such, human rights due diligence demands methodologies that are informed, in scope and procedural terms, by internationally recognized human rights standards, and should "[i]nvolve meaningful consultation with potentially affected groups and other relevant stakeholders."[10]

9. The corporate responsibility to respect human rights exists over and above compliance with national laws and regulations protecting human rights.[11] Business enterprises should therefore not wait for legal regimes on human rights due diligence to emerge before establishing and developing their own human rights due diligence processes, nor should they consider that mere compliance with legal requirements on human rights due diligence will necessarily be consistent with their responsibility to respect human rights. As stated in the Commentary to the UNGPs, "[t]he responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions."[12]

10. However, the relationship between human rights due diligence and the law does not end there. Despite the conceptual distinction between the corporate responsibility to respect human rights on the one hand, and questions of legal liability on the other, many companies recognize the importance of human rights due diligence from a legal risk management perspective. The Commentary to the UNGPs notes that "conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses."[13]

11. Understanding these linkages between human rights due diligence and legal liability (and particularly the way that different legal rules and conditions can influence the extent to which, and the standards to which, companies are compelled or encouraged to carry out human rights due diligence) can offer insights into different ways to strengthen domestic legal regimes from a business and human rights perspective. Although the corporate

[9] UN Guiding Principles 17-21 and Commentary.
[10] UN Guiding Principle 18.
[11] UN Guiding Principle 11, Commentary.
[12] UN Guiding Principle 12, Commentary.
[13] UN Guiding Principle 17, Commentary.

responsibility to respect is not of itself a legal standard, supporting and guiding human rights respecting behavior by companies, and enforcing legal standards where necessary, are key elements of the State's duty to protect.

12. These linkages will vary depending on the nature and aims of the regime in question. For instance, domestic regulatory regimes can be designed such that human rights due diligence is itself a legal standard of behavior. Under such a regime (which declares certain human rights due diligence activities to be mandatory), non-observance of human rights due diligence raises the prospect of legal liability, regardless of whether, or the extent to which, damage flows from that non-compliance. However, in other contexts the question of whether human rights due diligence was performed may be one of several threshold factual issues (e.g., in an assessment as to whether a duty of care was breached in a negligence case, where liability will ultimately hinge on whether this breach of duty was the cause of actual harm). In other cases, such as in a prosecution of a wrongful act for which there is strict liability, the fact that a company has conducted human rights due diligence will not have a bearing on whether the company is *prima facie* liable, but it may raise the possibility of a legal defense. In a criminal context, such as a case where corporate complicity is alleged, evidence of human rights due diligence could be relevant to whether the corporation had the requisite *mens rea* or "state of mind" to commit the offense.

13. The various ways in which non-observance of human rights due diligence can be material to legal liability in different contexts highlight the range of options available to States when it comes to embedding human rights concepts in legal regimes. States may adopt a combination of approaches to support, encourage, and compel the observance of human rights due diligence. However, these approaches need to be informed by clear policy aims, as well as a thorough understanding of the linkages involved. A key goal from the outset must be the encouragement of *meaningful* human rights due diligence by companies in the spirit of the UNGPs. Simple, compliance-focused "check box" approaches to human rights due diligence, whereby a company engages in procedural steps without meaningfully focusing on outcomes, would not meet this standard. A closer look at the different ways in which human rights due diligence and legal liability interrelate will demonstrate how States can help ensure meaningful diligence by business.

III. Domestic legal regimes requiring human rights due diligence as a standard of conduct

14. States could adopt laws that require companies to carry out human rights due diligence activities or else face legal liability. Several such laws have been passed, although most often with respect to assessing actual and potential adverse human rights impacts through reporting and disclosure obligations. More recent legislation and proposed laws have gone further, requiring companies to integrate and act upon those findings, track responses, and communicate how impacts are addressed.

15. Numerous factors need to be considered when legislators decide the scope of these laws, such as what types of companies will be bound, which business relationships must be accounted for, the harms that must materialize to trigger a company's liability, the penalties for non-compliance, and the methods of enforcement.

Case Study 1

Under the French duty of vigilance law, French companies with at least 5,000 employees in France, or 10,000 employees throughout the corporate group, must publish an effective vigilance plan detailing measures for risk identification and for the prevention of severe violations of human rights resulting directly or indirectly from their operations, as well as the operations from companies they control, and certain subcontractors and suppliers.[14] The vigilance plan must also be implemented; thus, companies must regularly assess risks, take

[14] LOI n° 2017-399 du 27 mars 2017.

action to mitigate risks or prevent serious violations, create an alert mechanism to identify risks, and have a monitoring scheme to follow up on the efficiency of implementation measures. Interested parties may enjoin companies to implement the plan and may sue if certain harms occur that could have been avoided if the companies had an effective vigilance plan in place.

Case Study 2

In Switzerland, a Responsible Business Initiative and related parliamentary initiative have been proposed that would require companies that have their registered office, central administration, or principal place of business in Switzerland to exercise due diligence to identify, prevent, cease, and account for violations of human rights and environmental standards in their own operations as well as companies they control.[15] The proposed law would make companies liable for damage caused by any company under their control, even for actions abroad, that could have been prevented had there been human rights due diligence.

16. Such laws can give companies clarity with respect to the human rights due diligence activities they are required to perform. This could help create a level playing field for companies, give human rights due diligence clear legal force, educate stakeholders and the wider public about company activities, and ultimately reduce risks of adverse human rights impacts from occurring.

17. At the same time, States should be careful to guard against unintended consequences of legal interventions. Participants at the Geneva meeting discussed possible disadvantages of "over-regulation;" for instance, the possibility that overly detailed and proscriptive legal regimes could discourage innovation and proactive behavior by companies and encourage narrow, compliance-oriented, "check box" human rights due diligence processes. On the other hand, too much flexibility may not provide sufficient levels of legal certainty for companies (especially if criminal sanctions are to be applied) and could make the regime difficult to enforce.

18. This balance can be difficult to strike in practice, and States should give careful thought to the policy aims of legislation when reconciling these competing considerations.

IV. Human rights due diligence and claims of negligence

19. The concept of negligence is a basis for corporate liability in many jurisdictions, and the extent to which a company conducts human rights due diligence can be relevant when determining whether it negligently caused or contributed to harm. While tests of negligence vary from jurisdiction to jurisdiction and from context to context, they frequently include the following elements: (1) the existence of a legal duty of care towards an affected person (i.e., a legal obligation to act in such a way that others are not harmed by one's actions or, in some cases, omissions), (2) a breach of the applicable standard of care by the defendant, and (3) a resulting injury to the affected person (4) caused by the breach.

20. Whether an entity owes a legal duty of care towards an affected person depends on the facts of each case, in particular the relationship between all of the different actors involved. Domestic tests differ, although factors such as (1) whether a harm was reasonably foreseeable and (2) whether there was sufficient proximity between the parties (i.e., such that imposing a duty of care on a defendant would not be unjust) are often relevant to whether a legal duty of care may be said to exist.

[15] *See* http://konzern-initiative.ch/wp-content/uploads/2017/11/The-initiative-text-with-explanations.pdf.

21. The appropriate standard of care in a claim of negligence is a question regarding what conduct was reasonable given the circumstances. It is a flexible standard that takes into account numerous factors, including the foreseeability, severity, and likelihood of harm; the relationship between the defendant and the affected person(s); and the extent to which the defendant could, and did, prevent or mitigate the harm.

22. Although many companies appear to view human rights due diligence as relevant to their management of litigation risks,[16] there is little evidence as yet that the consensus position reflected in the UNGPs (as regards the corporate responsibility to respect in general and the basic elements of human rights due diligence in particular) is having an impact on judicial decision-making about the nature and scope of corporate duties and standards of care in cases where businesses are alleged to have caused or contributed to adverse human rights impacts. There are few instances of the UNGPs being referred to directly in court judgments.[17]

23. Participants of the Geneva meeting discussed the benefits of the flexibility inherent in the common law system. It was noted that this case-by-case method of legal development provides judges with a certain amount of flexibility to respond to contemporary policy demands and societal expectations. Decisions as to whether there is a duty of care in the circumstances,[18] and the nature and content of the applicable standard of care, are heavily influenced by policy considerations in practice, and common law judges can and do draw from a wide range of policy sources to help inform their work. Embedding human rights due diligence concepts in this context requires judges to be familiar with the elements of human rights due diligence, as described in the UNGPs, and, moreover, to appreciate the value of human rights due diligence as a risk management process, and hence its relevance to the question of whether a standard of care has been met in the circumstances. In addition, judges need access to the technical expertise necessary to enable them to make a realistic assessment as to whether human rights due diligence steps taken by a company were sufficient in the circumstances and, if not, whether the failings of the company concerned were the cause of the harm suffered.

24. These practical considerations are also relevant to civil or "codified" systems of law. There may be greater potential in civil systems (compared to common law systems) to incorporate direct references to the UNGPs in legal frameworks relevant to corporate negligence cases. However, the demands for technical support and awareness-raising among members of the judiciary as to the fundamentals of human rights due diligence and their relevance in corporate negligence cases are likely to be similar.

V. Human rights due diligence as a possible defense to liability

25. While not appropriate in all cases, the exercise of human rights due diligence could be a basis for a possible defense to liability. The equitability and rights-compatibility of permitting such a defense will depend on many factors, including what kind of harm was involved, the connection of a company to the harm, victims' alternative avenues to remedy, and the State's regulatory aims.

26. In some instances, policy justifications counsel the use of strict liability, which shifts the burden of proof onto a company to prove that it should not be held liable for some harmful act.[19] By definition, strict liability offenses permit defenses. In contrast, absolute

[16] *See, e.g.*, Robert McCorquodale et al., *Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises*, 2 BUS. HUM. RTS. J. 195, 201 (2017).

[17] Although some decisions in Canadian courts have made tangential references to the UNGPs. *E.g.*, *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856; *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414.

[18] For instance, the extent to which there may be a duty of care on the part of a parent company towards those affected by the business activities of a subsidiary. For a UK decision on this point see *Chandler v. Cape plc.*, [2012] EWCA Civ 525.

[19] Strict liability has to do with the presumed liability of a direct perpetrator for engaging in certain prohibited conduct, regardless of the intentions of the actor. This is not to be confused with the issue of how such liability is to be distributed amongst a corporate group. For instance, whether a parent

liability offenses automatically lead to the liability of the responsible party. While the use of strict and absolute liability provides incentives to companies to exercise due diligence activities to avoid liability, allowing a strict liability defense based upon human rights due diligence in appropriate cases can potentially ensure even higher levels of vigilance.

27. There are legal contexts in which a defense to corporate liability exists for having met a defined due diligence standard.

Case Study 3

In the field of bribery, the UK Bribery Act 2010 created a strict liability offense for companies for failing to prevent bribery; however, the Act gives companies a defense if they can show that they had in place "adequate procedures" designed to prevent such conduct.[20] Thus, companies are encouraged to have due diligence processes in place to prevent violations from occurring. If a company can show it had done everything in its power to make sure associated persons did not engage in bribery, it could avoid punishment even if bribery occurred by someone; however, that person can still be found liable under other provisions of the Act.

28. Allowing a defense based on the exercise of some form of due diligence can be extended to the human rights field as well.

Case Study 4

The Swiss initiative referenced above establishes a company's liability for damage caused by companies under its control but provides a full defense under that provision if the company can prove that it took all due care to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken.[21] As with the Bribery Act, the initiative creates a presumption of liability as well as a defense to displace the presumption, and the direct perpetrator of the harm can still be found liable.

29. Permitting a defense to liability based upon human rights due diligence activities could incentivize companies to meaningfully engage in such activities and have important preventative effects; however, there are serious concerns with the appropriateness of a human rights due diligence defense in some cases. Participants in the Geneva meeting expressed concern that such a defense might not be fair to victims in some cases. In particular, the participants drew attention to the inappropriateness and unfairness of business enterprises seeking to raise due diligence defenses in cases where superficial "check box" approaches to human rights due diligence might be used as a reference point instead of genuine attempts to identify, mitigate, and address human rights risks as contemplated in the UNGPs. The discussion highlighted the importance of ensuring that judges are familiar with the content of the UNGPs as it relates to human rights due diligence so they can distinguish genuine efforts by business enterprises to identify and address risks from superficial efforts, and make their decisions accordingly.

VI. Human rights due diligence and secondary liability

30. A company's exercise of human rights due diligence will also be relevant to claims based on secondary liability. Secondary liability or "complicity" may arise when a business enterprise contributes to adverse human rights impacts caused by other parties. Tests for

company should be held automatically liable for the actions of a subsidiary is a distinct question from whether the subsidiary should be presumed to be directly liable for committing a strict liability offense.

[20] Bribery Act 2010, § 7.

[21] *See* http://konzern-initiative.ch/wp-content/uploads/2017/11/The-initiative-text-with-explanations.pdf.

such liability vary between jurisdictions with respect to the degree of culpability needed (e.g., intentional, knowing, reckless, or negligent assistance) and the degree of contribution needed (e.g., material or substantial assistance) to give rise to legal liability.[22]

31. Conducting human rights due diligence should help companies reduce the risk of legal liability based on theories of complicity by showing that they took every reasonable step to avoid involvement with or contribution to alleged human rights abuse. However, it can be challenging to design secondary liability regimes in such a way so that companies realize that carrying out human rights due diligence with respect to the activities of their business partners is in their best interest (e.g., with regards to legal, reputational, and commercial risks). For instance, secondary liability tests based on "knowledge" may create incentives for companies to not thoroughly investigate sources of human rights risk. To avoid such perverse incentives, legal regimes can use objective standards of proof and principles of "willful blindness," whereby defendants cannot claim ignorance of circumstances where the relevant knowledge would have been relatively easy to obtain.[23] Such concepts will encourage companies to conduct human rights due diligence since not knowing the adverse human rights impacts with which companies may be involved as a result of their business relationships would increase legal risk and be an unreliable defense.[24]

VII. The role of human rights due diligence in determinations of sanctions and remedies

32. In addition to being relevant to whether a company should be liable under a range of theories, human rights due diligence can also be relevant for determining the type and severity of sanctions and remedies once liability is established. Judges often have a considerable amount of discretion and can increase or reduce sanctions and remedies depending on the level of culpability of the company.[25]

33. The fact that a company approaches human rights due diligence seriously and thoroughly can be raised in mitigation. This will not always be relevant (e.g., where the remedy sought is intended to be entirely compensatory), but it will be relevant in criminal sanctioning as well as civil cases where punitive damages are part of the remedy package.[26] Indeed, some States decrease the amount of punishment if a company has engaged in human rights due diligence activities.

Case Study 5

The United States Sentencing Commission Guidelines provide that one of the two factors that mitigate the ultimate punishment of an organization is the existence of an *effective* compliance and ethics program. In order to have a mitigated punishment, companies must "(1) exercise due diligence to prevent and detect criminal conduct; and (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[27]

[22] *See* Illustrative examples, 2.1, 13.1; A/HRC/32/19/Add.1, paras. 18-20, 51-54.
[23] *See* Illustrative examples, 3.1, 14.1.
[24] *See* A/HRC/11/13, paras. 80-84.
[25] *See* A/HRC/32/19, Annex, Policy Objectives 11.2, 19.2.
[26] *See* Illustrative examples, 3.1, 11.2.
[27] USSG Ch.8, §8B2.1.

Case Study 6

Under Italian Legislative Decree 231/2001, companies can receive a reduction of pecuniary sanctions if, before any trial starts, they fully compensate any damage, and adopt and implement an organizational model suitable to prevent similar crimes from occurring again.[28]

34. If a company fails to exercise human rights due diligence, a court could mandate such activities as part of a sanction or remedy, or as part of a plea agreement. A potential challenge for States is to ensure that these activities are properly implemented.[29] In some anti-bribery enforcement actions, compliance monitors are used to ensure companies are making appropriate efforts to prevent repetition. This could be transposed to the human rights space as well. Lessons could be drawn from the practice of national contact points set up under the OECD Guidelines on Multinational Enterprises, as well as the Bangladesh Accord Complaints Mechanism, both of which have means to follow up when human rights due diligence activities have been recommended or imposed as part of the outcomes of their respective processes.

VIII. Reaching out to practitioners, policymakers, and civil society regarding the role of human rights due diligence in determinations of corporate liability and attendant penalties

35. The final sessions of the consultation moved the discussion on from the content of domestic law regimes to questions concerning education and outreach; specifically the steps that could be taken to raise levels of understanding among policymakers, the judiciary, regulators, legal practitioners, risk-assessors, and other stakeholders regarding how human rights due diligence and legal liability interact.

36. The consultation highlighted the need for targeted education and outreach activities, while noting that some efforts would be cross-cutting. For instance, lawyers could be educated on business and human rights generally, and human rights due diligence and legal liability specifically, through the inclusion of such topics in law school curricula, continuing legal education and professional development courses, and practitioners' guidance.

37. In reaching out to business actors and their advocates (including directors, managers, employees, financial and risk officers, in-house counsel, and compliance officers), it is important to bear in mind that such actors often already engage in some human rights due diligence activities, just by a different name (e.g., "risk management and compliance"). This existing knowledge and expertise could be leveraged by showing how human rights risks can translate to legal, financial, and reputational risks to the company, while at the same time making it clear that human rights due diligence focuses on risks to people. The International Bar Association's Handbook for lawyers on business and human rights, which was developed as a practical guide for corporate lawyers, shows how this can be done. This project brought together business and human rights specialists and experienced corporate lawyers to ensure that the guidance had a strong basis in human rights while utilizing terminology and concepts that lawyers without a background in human rights could understand and relate to.[30] Professional associations and business networks clearly have a vital role in disseminating this knowhow.

38. Affected individuals and their advocates could benefit from greater understanding of the relationship between human rights due diligence and legal liability, so that failures of

[28] Italy, Legislative Decree 231/2001, art. 12.

[29] *See* A/HRC/32/19, Annex, Policy Objectives 11.4, 19.4.

[30] https://www.ibanet.org/Handbook-for-lawyers/Contents.aspx.

human rights due diligence can be challenged effectively. Where legal action has succeeded in clarifying the law with respect to human rights due diligence, it is important and beneficial that the relevant legal information, and lessons learned, are disseminated widely.

39. It is also important to reach out to independent regulators and enforcers, including prosecutors, investigators, regulatory enforcers, independent auditing companies, and certification bodies. There is often a lack of a human rights-lens in these professionals' work; an understanding of how their work contributes to the protection and promotion of human rights standards has the potential to improve effectiveness, as well as improve morale and motivation. The development of targeted practical guidance is one good way of accomplishing this. For example, the Corporate Crimes Principles were created as a means of showing how law enforcement could realistically infuse business and human rights within their work.[31] Such guidance and other means of education can be promoted at meetings of professional associations in this space.

40. Reaching out to decision-makers, such as judges, domestic and regional courts, non-judicial mechanisms, and arbitrators, is also an important way of ensuring that the relationship between human rights due diligence and legal liability is clarified and operationalized. Judges often face cases where a company's exercise of human rights due diligence is relevant to deciding a case, but they might not look at the case in those terms. The more advocates frame cases in terms of human rights due diligence before domestic judicial and non-judicial mechanisms, as well as regional courts, the more decision-makers will begin making the connections between the concept and legal liability. In general, the development of robust, credible, and, where appropriate, sector-specific guidance as to the technical requirements of human rights due diligence in different operating contexts would be a useful way of reaching out to decision-makers.[32] Suitable trainings of judges would be particular useful; such trainings have been conducted by OECD national contact points in some instances.

41. Policymakers at the national, regional, and international levels are also important stakeholders to reach out to in order to promote a clearer link between human rights due diligence and legal liability. There is a recent push for stronger laws requiring companies to implement human rights due diligence activities (as evidenced by the French duty of vigilance law and various proposals elsewhere).[33] Civil society organizations and others campaigning for legal reforms should recognize and take advantage of the momentum in this field. Robust, evidence-based guidance will be particularly useful for States contemplating new laws and approaches regarding the relationship between human rights due diligence and legal liability. In this regard, the Accountability and Remedy Project Part I report can help policymakers develop realistic ways of implementing and incorporating the UNGPs.

IX. Concluding Remarks

42. **The UNGPs call on business enterprises to conduct human rights due diligence in order to meet their responsibility to respect human rights. Such diligence allows businesses to identify, prevent, mitigate, and account for how they address their adverse human rights impacts. The Guiding Principles further provide important guidance and standards for how human rights due diligence should be conducted.**

43. **While the responsibility of business enterprises to respect human rights (of which human rights due diligence is an integral part) is theoretically distinct from issues of legal liability, there are many ways in which the two concepts can interact in practice.**

[31] http://www.commercecrimehumanrights.org/.

[32] A/HRC/32/19, Annex, Policy Objectives 3.4, 14.4.

[33] *See supra* Part 3.

44. **During the Geneva consultation, participants discussed several strategies that States could adopt to articulate this connection more clearly and to encourage greater use of human rights due diligence. These included:**

- **Mandating human rights due diligence activities under threat of legal liability;**
- **Evaluating the standard of care in negligence claims by reference to human rights due diligence standards;**
- **Permitting a human rights due diligence defense to certain offenses in appropriate cases;**
- **Considering the extent to which human rights due diligence was conducted when evaluating claims based upon theories of secondary liability; and**
- **Taking into account a company's exercise of human rights due diligence when determining the type and severity of sanctions and remedies if liability is established.**

45. **Whatever the approach taken, it is important than this is informed by clear policy aims. A key goal from the outset must be the encouragement of *meaningful* human rights due diligence by companies in the spirit of the UNGPs. However, in reaching for this goal, States should be careful to guard against unintended consequences of legal interventions; in order to avoid recourse to superficial, "check box" diligence approaches, a balance must be struck between legal certainty and providing businesses with flexibility in how they design their human rights due diligence processes.**

46. **These policy aims will not be achieved, however, if legislators responsible for the design of legal regimes, and lawyers and judges responsible for interpreting them, are not familiar with the content of the UNGPs, and specifically what the corporate responsibility to respect entails in practice. The consultation identified a wide range of professionals and stakeholders whose work touches on human rights due diligence in various ways, whether through the design of legal regimes, or in providing advisory services to companies (e.g. with respect to the management of risk), or in holding companies to account. These are key actors in the complex web of legal and regulatory initiatives relevant to corporate respect for human rights, and their importance in ensuring that human rights due diligence is taken seriously and implemented properly by companies should not be overlooked.**

Annex I

Relevant Policy Objectives From Accountability and Remedy Project Part I

This annex reproduces sections from the Accountability and Remedy Project Part I report (A/HRC/32/19) discussing human rights due diligence.

Policy objective 3: The principles for assessing corporate liability under domestic public law regimes are properly aligned with the responsibility of companies to exercise human rights due diligence across their operations.

3.1 Domestic public law regimes take appropriate account of effective measures by companies to identify, prevent and mitigate the adverse human rights impacts of their activities.

3.2 Domestic public law regimes take appropriate account of effective measures by companies to supervise their officers and employees to prevent and mitigate adverse human rights impacts.

3.3 Domestic public law regimes make appropriate use of strict or absolute liability as a means of encouraging greater levels of vigilance in relation to business activities that carry particularly high risks of severe human rights impacts.

3.4 Enforcement agencies and judicial bodies have access to and take proper account of robust, credible and, where appropriate, sector-specific guidance as to the technical requirements of human rights due diligence in different operating contexts.

Policy objective 14: The principles for assessing corporate liability under domestic private law regimes are properly aligned with the responsibility of companies to exercise human rights due diligence across their operations.

14.1 Domestic private law regimes take appropriate account of effective measures by companies to identify, prevent and mitigate the adverse human rights impacts of their activities.

14.2 Domestic private law regimes take appropriate account of effective measures by companies to supervise their officers and employees to prevent and mitigate adverse human rights impacts.

14.3 Domestic private law regimes make appropriate use of strict or absolute liability as a means of encouraging greater levels of vigilance in relation to business activities that carry particularly high risks of severe human rights impacts.

14.4 Judicial bodies have access to and take proper account of robust, credible and, where appropriate, sector-specific guidance as to the technical requirements of human rights due diligence in different operating contexts.

Annex II

Consultation Agenda

Palais des Nations, Room XXIII

5-6 October 2017

DAY 1:
Thursday, 5 October 2017

10:00 – 10:15 Introduction

Formal welcome and quick walk-through of agenda.

Led by:

Lene Wendland (OHCHR)

10:15 – 11:30 Session 1: General Review of the Accountability and Remedy Project and Recent Initiatives by Stakeholders

After quickly recapping ARP I and providing updates on ARP II, the floor will be opened to participants so they can share any initiatives undertaken to promote or implement the recommendations of ARP I.

Open discussion, moderated by:

Lene Wendland (OHCHR)

11:30 – 13:00 Session 2: Deconstructing Human Rights Due Diligence and its Relation to Corporate Liability

This panel discussion will break down the relationship between due diligence and legal liability to clarify what the nature and scope of this relationship is and the different ways that it can be legally expressed.

Panel discussion, moderated by:

Gerald Pachoud (Pluto & Associates)

Panelists:

Jennifer Zerk (Legal consultant, OHCHR Accountability & Remedy Project)

Rachel Davis (Shift)

Rae Lindsay (Clifford Chance)

Jonathan Kaufman (Advocates for Community Alternatives)

13:00 – 15:00 *Break for Lunch*

15:00 – 16:30 Session 3: Legal Regimes Requiring Companies to Carry Out Human Rights Due Diligence

This session will explore the range of laws that exist or are currently being proposed, how they work in practice, and the pros and cons of different regimes.

Panel discussion, moderated by:

Sarah McGrath (ICAR)

Panelists:

Jane Ellis (IBA)

Elise Groulx-Diggs (Doughty Street Chambers)

Esteban Mezzano (Nestlé)

Julia Lear (International Labour Organization)

16:30 – 18:00 Session 4: Human Rights Due Diligence and Claims of Negligence

This session will explore the relationship between human rights due diligence and claims of negligence with a particular focus on the extent to which courts have thus far explicitly referred to or drawn from UNGP guidance on human rights due diligence in their analysis of whether the relevant standard of care was met by the defendant company in question. Panelists and participants will be invited to reflect on what could be done to promote greater awareness of human rights due diligence concepts by courts and judges and how to better "embed" human rights due diligence concepts into domestic negligence regimes.

Panel discussion, moderated by:

Margaret Wachenfeld (Themis Research)

Panelists:

Richard Meeran (Leigh Day)

Doug Cassel (Notre Dame Law School)

Anita Ramasastry (UN Working Group on Business and Human Rights)

Catie Shavin (Global Business Initiative on Human Rights)

DAY 2:
Friday, 6 October 2017

10:00 – 10:15 Recap of Day 1 and Agenda for Day 2

Led by:

Jennifer Zerk (Legal consultant, OHCHR ARP)

10:15 – 11:30 Session 5: Human Rights Due Diligence and Strict / Absolute Liability

This session will discuss when strict and absolute liability is appropriate, as well as what role, if any, due diligence should have in relation to these regimes.

Panel discussion, moderated by:

Humberto Cantú Rivera (Universidad de Monterrey)

Panelists:

Julianne Hughes-Jennett (Hogan Lovells International LLP)

Krishnendu Mukherjee (Doughty Street Chambers)

Sandra Cossart (Sherpa)

Elsa Savourey (Herbert Smith Freehills)

11:30 – 13:00 Session 6: The Role of Human Rights Due Diligence in Determinations of Sanctions and Remedies

This session will be devoted to how the outcomes of a remedy process should be affected by a company's exercise of due diligence.

Panel discussion, moderated by:

Carlos Lopez (International Commission of Jurists)

Panelists:

	Robert McCorquodale (British Institute of International and Comparative Law)
	Katherine Gallagher (Center for Constitutional Rights)
	Mike Congiu (Littler Mendelson)
	Maylis Souque (French NCP)
13:00 – 15:00	*Break for Lunch*
15:00 – 16:30	Session 7: Reaching out to Enforcement Agencies, Judicial Bodies, and Other Practitioners Regarding the Role of Human Rights Due Diligence in Determinations of Corporate Liability and Attendant Penalties
	This session will be devoted to figuring out how to best promote what was learned during the consultation to enforcement agencies, judicial bodies, and other practitioners who must decide how the existence of human rights due diligence relates to legal liability. It will be aimed at converting the substantive knowledge gleaned from the earlier sessions, and from the conclusions of ARP I, into practical action.
	Open discussion, with introductory remarks by:
	Mark Taylor (FAFO)
	Jennifer Zerk (Legal consultant, OHCHR Accountability & Remedy Project)
16:30 – 17:40	Session 8: Promoting policy coherence in national, regional, and international initiatives
	This session will discuss the current processes and initiatives that could benefit from increased clarity regarding the relationship between human rights due diligence and corporate liability, and explore how to engage with the policy-makers behind these initiatives.
	Open discussion, with introductory remarks moderated by:
	Christopher Schuller (German Institute for Human Rights)
	Discussants:
	Gabriela Quijano (Amnesty International)
	Paul Noll (Confederation of German Employers' Associations)
17:40 – 18:00	Closing Remarks
	Led by:
	Lene Wendland (OHCHR)